Supreme Court, U.S.
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In The Supreme Court of the United States

SUPERIOR HIGHWALL MINERS, INC., and TEREX CORPORATION,

Petitioners,

v.

DANNY L. FRYE,

Respondent.

On Petition For A Writ Of Certiorari To The Circuit Court Of Boone County, West Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, a West Virginia jury awarded $328,280 in compensatory damages and $1.5 million in punitive damages in an age discrimination case. Upon post-trial review of the jury's verdict, the trial court entered an order, prepared by plaintiff's counsel, holding that (1) evidence of a prima facie case is sufficient; (2) rejection of a nondiscriminatory reason is sufficient; and (3) the evidence presented was sufficient to support the award of punitive damages. The Supreme Court of Appeals of West Virginia refused a petition for appeal from the trial court's order. The following questions presented are:

Whether the trial court erred when it held that the Petitioners' conduct was sufficiently "reprehensible" to warrant the imposition of punitive damages.

Whether the trial court erred when it held that the Petitioners' conduct warranted the imposition of punitive damages in a ratio to compensatory damages of nearly 5:1.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Terex Corporation is a publicly traded company. It has no parent corporation and no entity owns 10% or more of its stock.

Superior Highwall Miners, Inc., is a wholly-owned subsidiary of Terex Corporation.

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JURISDICTION

The trial court entered judgment on March 9, 2009. Petitioners filed a timely petition for appeal with the Supreme Court of Appeals of West Virginia, which was denied on January 13, 2010. App.60a-61a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The Fourteenth Amendment provides, "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

This case presents two recurring issues of great importance to the fair administration of justice; specifically, what degree of reprehensible conduct is required before punitive damages may be imposed and when may punitive damages exceed by several multiples the compensatory damages awarded?

In this case, entering an order prepared by plaintiff's counsel, the trial court expressly allowed plaintiff to recover punitive damages because "[t]he jury heard evidence at trial that Mr. Frye was terminated when he was 62 years old and replaced by a 34 year old. That fact alone is sufficient to create an inference for the jury that the defendants intentionally terminated Mr. Frye on the basis of age in disregard of his rights under the Human Rights Act." App.24a. In other words, the trial court confused evidence of discrimination for purposes of compensatory damages with evidence of reprehensibility for purposes of punitive damages, holding that whenever a terminated employee in a protected classification is replaced by someone outside that classification, punitive damages may be recovered because such act constitutes "intentional discrimination." Petitioners submit that this does not comport with this Court's decisions concerning the degree of reprehensibility required for the imposition of punitive damages, particularly when the ratio of punitive to compensatory damages was nearly 5:1.

The trial court also allowed plaintiff to recover punitive damages because "the jury could have also reasonably found that the defendants were guilty of intentional discrimination in disregard of the Plaintiff's rights by finding that the reasons given for the Plaintiff's termination were pretextual." App.24a. In other words, the trial court confused evidence of pretext to rebut a non-discriminatory reason for purposes of compensatory damages with evidence of

reprehensibility for purpose of punitive damages, holding that whenever a jury rejects an employer's non-discriminatory reason as pre-textual and returns a verdict for plaintiff, punitive damages may be recovered because rejection of such reason constitutes evidence of "intentional discrimination." Indeed, the trial court described the rejection of an employer's non-discriminatory reason as a "cover up" of discriminatory intent justifying the imposition of punitive damages. App.32a. Petitioners submit that this does not comport with this Court's decisions concerning the degree of reprehensibility required for the imposition of punitive damages, particularly when the ratio of punitive to compensatory damages was nearly 5:1.

A. Background and Evidence at Trial

1. Petitioners. Superior Highwall Mining ("SHM") assembles and tests highwall mining machines, 3 Tr. 135; 4 Tr. 101, at its facility in Beckley, West Virginia, 3 Tr. 73, 4 Tr. 106-07. It was founded in 1994 by Steve Antoline ("Mr. Antoline"), who was fifty-two years old at the time of trial. 4 Tr. 99-100. Highwall mining is environmentally friendly because highwall miners are used to follow old auger holes extracting previously unreachable coal. 4 Tr. 101-02. It is also safer because no personnel are required to go underground. 4 Tr. 101.

Terex Corporation ("Terex") is a large international manufacturer of construction and mining

equipment headquartered in Westport, Connecticut. Terex has 10,000 employees in the United States and approximately 20,000 worldwide. 3 Tr. 113. Terex acquired SHM in early November 2007. 5 Tr. 115.

At the time of the decision to eliminate plaintiff's position, Terex/SHM had eighty-three employees, 55% to 60% of whom were over the age of forty and seven of whom were over the age of sixty. DX 11; 3 Tr. 177; 5 Tr. 49-50. In addition, one temporary employee approaching the age of seventy was hired every year to work until his income reached a certain point, then was rehired the following year. 4 Tr. 141-42, 146.

2. **Plaintiff's Employment.** Prior to plaintiff's employment, most of his duties had been outsourced, and after SHM was acquired by Terex, it decided to once again outsource those duties. Thus, the issue was never whether plaintiff would be retained in his same position, because that position would no longer exist after the Terex acquisition. Rather, the issue was whether plaintiff would be retained in a different position.

In January 2007, the outside contractor who had performed payroll work for SHM two days per week gave notice she could no longer do the work and a decision was made to hire someone to do payroll in-house. 4 Tr. 110. Plaintiff was interviewed for the job of Accounting/Human Resources by Mr. Antoline and Terry Gwinn, then serving as Chief Financial Officer.

2 Tr. 138, 145; DX 2. Accordingly, SHM was aware he was an older worker when he was hired in February 2007. 2 Tr. 138; 4 Tr. 113.

Plaintiff was told that he would have payroll duties and some human resources ("HR") responsibilities such as organizing files, getting employees checked for compliance with various drug and alcohol laws and policies, and performing clerical work related to benefits enrollment. 2 Tr. 147; 4 Tr. 113. By no means, however, was plaintiff responsible for higher-level human resources functions. For example, plaintiff was not involved with interviewing, hiring, or compensation. 2 Tr. 159-61, 219. Rather, his duties were mainly clerical. 3 Tr. 87-88, 138; 5 Tr. 86.

3. Plaintiff's Experience. In the course of roughly thirty years of work experience, plaintiff had bounced around, occupying various accounting and management positions, including owning and operating his own small business, 2 Tr. 125-40, but he had never been a human resources manager, 2 Tr. 134. In fact, despite his assertions to the contrary, the evidence was that he had little human resources experience. Even plaintiff's own resume did not mention any previous HR experience. 2 Tr. 131-34; DX 4.

4. Plaintiff's Performance/Misconduct. As previously mentioned, plaintiff's position was eliminated. He was not terminated for poor job performance. 3 Tr. 126, 184. Nevertheless, in opening statement, his counsel began constructing a straw-man argument by advising the jury that plaintiff had

been terminated for performance issues, 2 Tr. 13-14, 25, and later elicited irrelevant testimony that plaintiff had never been warned about his performance or told that he needed to improve, 2 Tr. 79-80.

Obviously, companies are allowed to eliminate the positions of even the most competent employees. Apparently suspecting that he would lose the argument that he was qualified for the new human resources position, plaintiff's strategy was to turn this case into a trial on his job performance. Faced with rebutting plaintiff's evidence of his job performance, Respondents proceeded to offer plentiful evidence rebutting this claim, which was later used by the trial court to justify the imposition of punitive damages under the rationale that it constituted a "cover up," as if defending a discrimination suit by offering non-discriminatory reasons and responding to a plaintiff's job performance claims warrants the imposition of punitive damages.

There was evidence that the plaintiff spent a lot of unproductive time around the office chatting with other employees. 3 Tr. 64, 140; 5 Tr. 46, 62, 87. In fact, John Olsen ("Mr. Olsen"), who had been hired by SHM as Chief Operating Officer in May 2007, 2 Tr. 163-64, but was promoted to Chief Executive Officer after the Terex acquisition, received complaints from employees that it was difficult for them to get work done because of this. 3 Tr. 140. Also, Mr. Olsen asked plaintiff to put a detailed performance review system in place and gave him a form to follow, but plaintiff never implemented any review system. 3 Tr. 143-44.

Indeed, when a Terex employee transferred from Texas to implement Terex policies during the transition while a new HR manager was being hired, she found no formal disciplinary, overtime, attendance, or evaluation policies. Elliott Tr. 31.

Additionally, although plaintiff admitted that it is not appropriate to discuss confidential human resources information, 2 Tr. 165, he repeatedly violated this policy. For example, he told one employee that Mr. Antoline was making "$400,000 plus" even though Mr. Antoline's salary was confidential. 2 Tr. 160; 5 Tr. 63-64. He also told the employee that Jim Argabright, Sales Director at Terex, had reached his 401(k) maximum contribution of $15,000, 5 Tr. 64-65, which was confidential. He disclosed to another employee the amount Terex was paying Dave Hoffman ("Mr. Hoffman"), plaintiff's supervisor, 5 Tr. 8, 27. He told another employee that Mr. Antoline had been overpaid, which was untrue, and that plaintiff would have to go back and readjust his pay. 5 Tr. 98. And, he told another employee Mr. Hoffman made more than the two of them put together, 4 Tr. 156, obviously an inappropriate disclosure. These lapses of confidentiality and other performance issues led to a disciplinary counseling in October 2007.

5. October 2007 Disciplinary Counseling. As a result of complaints received from employees about plaintiffs' breaches of confidentiality, 3 Tr. 148-50, Mr. Olsen asked Mr. Huffman to put together a list of talking points to address with plaintiff, 3 Tr. 150-51, DX 23. The meeting with plaintiff was

conducted by Mr. Olsen and Mr. Hoffman on October 12, 2007. 3 Tr. 148, 151. Plaintiff admits that during the meeting, Mr. Olsen and Mr. Hoffman cautioned him about discussing confidential information with other employees in the office, 2 Tr. 164, and about standing around too much, 2 Tr. 168-69. The other issues on the talking points memo were also discussed. 3 Tr. 152. The meeting was calm and nobody raised their voices, 2 Tr. 169, but plaintiff was angry and after the meeting offered his resignation to Mr. Olsen, 2 Tr. 169; 3 Tr. 153. Mr. Olsen knew that plaintiff was in his sixties at the time and could have accepted his resignation, 2 Tr. 170, 3 Tr. 154, but instead told plaintiff that "we don't want you to resign," 2 Tr. 169-70; 3 Tr. 153-54. Obviously, if Mr. Olsen had any discriminatory animus towards plaintiff in October 2007, it is reasonable to infer that he would have accepted plaintiff's resignation.

6. List of Employees. One piece of evidence plaintiff relied upon heavily at trial to demonstrate age discrimination was a list of all Terex/SHM employees plaintiff himself compiled in November 2007 after the Terex acquisition. 2 Tr. 99. He was asked to compile the list by David Peterson in the HR Benefits Group in Westport, Connecticut. 2 Tr. 103; 171-72. In its first version, the list contained employee names, jobs and earnings. In the second version prepared two weeks later, plaintiff was asked to add dates of hire and dates of birth. 2 Tr. 99; DX 11.

Of course, it is common for a company to collect information like this when acquiring another company. 5 Tr. 140; 6 Tr. 60. Indeed, the information, including dates of birth, was requested to permit Terex to budget for the migration of employees to the Terex benefit plans, which differed from SHM's plans. 3 Tr. 112, 174-75; 5 Tr. 142-43; 6 Tr. 60. At sixty-two years of age, plaintiff was not the oldest worker shown on the list, and he admitted he had no information that Terex made any judgments about employees on the list because of age. 2 Tr. 175. In fact, nobody on the list was affected except plaintiff, even other older employees with health problems, 3 Tr. 177-78, rendering plaintiff a class of one.

Although healthcare costs are higher for older workers, healthcare cost has never been used at Terex in deciding whether to hire or terminate an employee. *Id.*[1] The record is full of examples of older workers who missed months because of costly health conditions who were restored to their positions. Some had their position substantially modified to enable them to return.[2] Terex is an international company with a well-established history of treating its older workers like everyone else and the theory that it singled out plaintiff for termination because of his age is ludicrous.

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[1] 5 Tr. 50-52; 5 Tr. 47; 5 Tr. 47-48; 5 Tr. 112, 122.

[2] 3 Tr. 34-35; 4 Tr. 130-31; 5 Tr. 15-16; 4 Tr. 131-32; 5 Tr. 18-19; 5 Tr. 20-22, 39-40.

7. Decision to Eliminate Plaintiff's Position. Frequently, when a larger company acquires a smaller one, as happened in this case, duties are consolidated, positions are eliminated, and employees who are terminated receive outplacement assistance. Otherwise, the economic benefits of acquisitions cannot be realized, productivity suffers, and the consequences are felt by the employees and community. In this case, plaintiff was a victim of consolidation, not discrimination. Most of his duties were performed by an outside company when he was hired in February 2007 and those same duties were outsourced to a different company when the decision was made to eliminate his position in November 2007.

After being advised that he was being appointed CEO, Mr. Olsen began considering the type of organization he wanted. 3 Tr. 96-97, 158. He had worked previously with senior-level human resources professionals and believed the abilities they possessed would be required because rapid growth was anticipated. 3 Tr. 146-47. These included strategic management, succession planning, and implementation of a performance evaluation system. *Id.*

On November 14-15, 2007, Mr. Olsen went to Connecticut and met with Gary Clarke ("Mr. Clarke"), group Vice President for Human Resources. 3 Tr. 96; 5 Tr. 118. In advance of that meeting, Mr. Olsen prepared a new organizational chart for SHM showing the HR Manager position elevated to report to the CEO. 3 Tr. 144-45. During the meeting, Mr. Olsen

advised he did not think plaintiff was a fit for the new HR job. 3 Tr. 96; 5 Tr. 118.

Mr. Clarke, who was forty-six years old at the time of trial, is an example of the training and experience senior HR people possess, with a Bachelor of Science degree in Industrial and Labor Relations from Cornell, where he studied human resources extensively. 5 Tr. 110-11. He had varied industry experience in human resources before assuming the position of Group VP for Human Resources for the Materials, Processing and Mining Division. 5 Tr. 111.

In early November 2007, Mr. Clarke had heard from Mr. Antoline and Mr. Hoffman, who had respectively hired and supervised plaintiff prior to the Terex acquisition, that they did not think he was qualified for the new HR Manager position. 5 Tr. 117. Nevertheless, Mr. Clarke asked for time to investigate plaintiff's suitability: "I wanted to support Mr. Olsen's decision so I said it would be important for me to understand Mr. Frye's background in greater detail before taking any action and that I wanted to meet with Mr. Frye to be able to better understand his background." 5 Tr. 119. Thus, Mr. Clarke came to Beckley, West Virginia, on November 28, 2007, where he reviewed plaintiff's personnel file, including his application and resume, and interviewed him for 1½ hours, 3 Tr. 145; 5 Tr. 120, after which he concluded that plaintiff was unqualified for the new HR Manager position, 5 Tr. 122-23.

Thus, the evidence was that plaintiff's employment was terminated, not because of his age, but because his position was eliminated, 3 Tr. 86-88, 121-22, and he was not qualified for the new HR Manager position that would be created, 3 Tr. 88, 120-21, 155; 5 Tr. 125, 152. His accounting training and experience simply did not provide him with the right skills. *Id.*; 5 Tr. 123. The issues with his performance detailed above – including his breaches of confidentiality – did not cause the termination. 3 Tr. 88-89, 146. Nonetheless, the performance issues were considered in connection with whether plaintiff had the right skills for the new job. 3 Tr. 88-89, 144; 5 Tr. 116-17, 129-30.

8. Implementation of the Decision. Mr. Olsen and Mr. Clarke met with plaintiff on November 29, 2007, at a restaurant near the SHM facility. This off-site location was selected because these meetings can get emotional and neither Mr. Olson nor Mr. Clarke wanted plaintiff to be embarrassed. 3 Tr. 161; 5 Tr. 125-26. All the participants agree that plaintiff was told he did not have the expertise or the training to be an HR Manager in the Terex system. 2 Tr. 180. He was also told that the decision was not because of poor performance. 5 Tr. 129. Plaintiff asked about a severance package and was told one would be prepared and given to him in the next few days. 3 Tr. 161-62. He was not told to pack up his belongings and get out, 3 Tr. 162, but rather was told there were several transition tasks he could do for the next six to eight weeks. 3 Tr. 110, 162-63.

On December 5, 2007, plaintiff was presented with a generous severance package that involved an offer of thirteen weeks of severance pay, even though he would only qualify for a single week of severance pay under Terex's normal severance policy. 3 Tr. 126-28; 5 Tr. 135-36; DX 9. This departure from policy was offered because, according to Mr. Clarke, the issue was a job/skills mismatch, not wrongdoing. 3 Tr. 127-28; 5 Tr. 136-37. The severance package also included an offer of outplacement assistance. It required plaintiff to work through January 14, 2008, and then sign a release and agree not to disclose confidential information. 5 Tr. 137; DX 9.

Plaintiff was advised by Mr. Olsen to consult with an attorney about the severance agreement and did so. When Mr. Olsen later inquired about the agreement, plaintiff told Mr. Olsen he believed the agreement was fair but that his lawyer advised him not to sign anything. 3 Tr. 169. Mr. Olsen suggested that both parties could agree to abide by the terms of the severance agreement without signatures and plaintiff agreed. 3 Tr. 169-71.

The plaintiff's last day of work was January 11, 2008. Because Terex allowed him to work until then pursuant to the severance agreement, he qualified for a new allotment of eighty hours of paid vacation, which was paid in his final paycheck. 2 Tr. 199-200; DX 22. Moreover, upon his departure, one severance payment in the net amount of $1,498.27 was made. 4 Tr. 162-63; DX 22. After the plaintiff called to confirm that the severance check had been deposited in his

account, he filed suit, and never returned the severance payment. 2 Tr. 206; 3 Tr. 171-72; 4 Tr. 163-65; 2 Tr. 209.

9. Elimination of Plaintiff's Position. The evidence was that plaintiff's position was eliminated, 3 Tr. 86-87, with his payroll tasks, which comprised 80% of his duties, outsourced to a service provider, 4 Tr. 154; 5 Tr. 126-27. Mr. Clarke also hired an interim HR manager, Wendy Elliott, for a temporary period to assist in the SMH/Terex transition until a permanent HR Manager could be hired. 5 Tr. 144. Ms. Elliott, who was thirty-four years old with an Associate Degree, including thirty hours of human resources course work, was a Human Resources Generalist at Terex's truck manufacturing facility in Denison, Texas. Elliott Tr. 20, 21, 46. She also had eleven years of progressively more responsible experience in human resources at Terex; was familiar with the Terex policies and procedures to be introduced at SHM; had Sarbanes-Oxley training and experience; and had significant international human resources experience, which included facilitating visa applications for traveling U.S. employees and managing payroll and benefits for Canadian employees. Elliott Tr. 4-23; 5 Tr. 155. Although she was not a candidate for the permanent position because she lacked a four-year degree, she was a perfect fit for the interim position.[3]

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[3] Ms. Elliott understood the job was temporary from the beginning. Elliott Tr. 26, 29. She never went on the payroll as an

(Continued on following page)

After this period of transition, the permanent HR Manager position was posted on May 15, 2008. DX 37. It took several months to locate an individual with the desired qualifications who wanted to live in Beckley, West Virginia. 3 Tr. 39. Ultimately, however, Jill Szakacs ("Ms. Szakacs") was hired for the position in September 2008. 3 Tr. 23. She met every qualification contained in the posting for the job and her HR qualifications were superior to plaintiff's qualifications. 3 Tr. 24; 6 Tr. 51; DX 37, 57. She had a Bachelor of Science degree in Business Administration from Bluefield State College and a Master's degree in Industrial and Labor Relations from West Virginia University. 6 Tr. 37. In her first job, she oversaw an increase in employment from 80 to 800 employees. 6 Tr. 42-43. In the job she held immediately before coming to Terex, she was the top HR person in an organization with over 1,800 employees. 6 Tr. 47-48. Plainly, she was hired, not for her youth, but because she was supremely qualified for this new position.

10. The Plaintiff's Claim to Other Jobs. When CFO Terry Gwinn was killed in a tragic accident in May 2007, plaintiff came to Mr. Olsen to

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SHM employee, *id.* at 30, and lived in a hotel during her assignment there. *Id.* at 29; 3 Tr. 65-66. For the interim role, she received $51,500 – the same salary she was paid in the job she had in Texas. *Id.* at 29. In comparison, the woman who was hired for the new HR Manager position received total compensation of over $100,000. 6 Tr. 78.

inquire about the job. Although Mr. Olsen told plaintiff that he might be qualified for the job and urged him to apply, plaintiff never did. 3 Tr. 103. Thereafter, SHM filled the position with an interim hire, Mr. Hoffman, who was in his sixties and, according to plaintiff, was "highly qualified, highly competent." 2 Tr. 219. Mr. Hoffman stayed in the interim CFO position until April 2008, well after plaintiff had departed. 3 Tr. 178. After Mr. Hoffman left, plaintiff never applied for the CFO position, but chose to sue claiming age and disability discrimination.

On November 29, 2007, after he was advised that his job was being eliminated, plaintiff asked Mr. Clarke "if there was any other positions I might get?" 2 Tr. 108. Mr. Clarke responded that there might be something in finance, but there was nothing in HR, and suggested that the plaintiff speak with Matt Crowe, the Vice President of Finance, who happened to be in Beckley at the time. 2 Tr. 108-09. Plaintiff spoke with Mr. Crowe for about ten minutes and was told there was nothing open in finance. 2 Tr. 110, 216.

The foregoing two conversations are the total effort plaintiff made to "apply" for other jobs at Terex. All open permanent jobs at Terex are posted online. 3 Tr. 20, 113. A Terex employee can make it known that he or she is interested in one of these jobs by using the Terex internal intranet or using the internet. Elliot Tr. 24. An applicant must apply online. Indeed, the permanent HR Manager job obtained by Ms. Szakacs was posted online, Elliot Tr. 57; DX 37; 6 Tr.

48-49, as was the CFO position after plaintiff left, which he saw on the internet, but for which he did not apply. 2 Tr. 220-21.[4]

In order to shore up his claims, however, plaintiff contended that Terex/SHM should have unilaterally reached out to him. 2 Tr. 220. In addition to the fact that Terex/SHH had no obligation to contact plaintiff, particularly after he never expressed an interest in the CFO position, he was not as qualified and was no older than the successful candidate.

Plaintiff had worked in manufacturing and mining for years and had been a Controller, but never a CFO. 2 Tr. 217. Moreover, he acknowledged that the CFO position under Terex was different than the interim CFO position held by Mr. Hoffman. 2 Tr. 219. Finally, at trial, plaintiff did not know who was hired for the CFO position and, therefore, could not claim that his own qualifications were superior to the successful candidate's. 2 Tr. 220-21.[5]

11. Trial. At the trial of this matter, plaintiff offered all of three exhibits – his application, the employee list he prepared, and a table of the present

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[4] Plaintiff also complained that Petitioners considered hiring someone with an accounting background just prior his departure, 3 Tr. 191-92, but there was no evidence that either that person or anyone else was hired for any accounting position either before or immediately after plaintiff's departure, nor was there evidence that any accounting position was ever posted.

[5] In fact, plaintiff was neither older than nor as qualified as the candidate who got the job. 3 Tr. 40, 42.

value of his lost earnings. PX 1, 2, 3. Much of his evidence dealt with his claim that the termination decision was based upon a disability, but the jury rejected this allegation.

As to his age claim, plaintiff presented no statistical evidence that Terex/SHM systematically discriminated on the basis of age and, as a practical matter, he would have been unable to do so because the workforce statistics overwhelmingly favored Terex/SHM. Plaintiff, likewise, presented no evidence that a facially-neutral Terex/SHM policy had a "disparate impact" on older workers because it has no such policy. Plaintiff also presented no evidence that he received any "disparate treatment," i.e., he was treated any differently than any similarly-situated employee. Finally, plaintiff presented no evidence of any actual bias as no member of management or any other person had expressed any desire to disfavor older workers and, indeed, the evidence was overwhelming regarding the employment, retention, and promotion of older workers.

Instead, plaintiff presented evidence that he was over the age of forty; was the subject of an adverse employment decision; was allegedly "replaced" by Ms. Elliott, the temporary employee, who was under the age of forty; and should have been retained in Ms. Elliott's position, should have been hired for the new HR Manager position, or should have been hired for some other position. Based upon this evidence, the jury determined that plaintiff was the victim of age discrimination, and awarded him $59,420 in back

pay, $243,860 in front pay, and $25,000 for emotional distress. App.63a. And, after answering the question, "Do you find that defendants' actions in this matter warrant an assessment of punitive damages against them?" in the affirmative, awarded plaintiff $1.5 million in punitive damages.

B. Post-Trial Review of Punitive Award.

Petitioners filed post-trial motions arguing, *inter alia*, that the evidence did not support an award of any punitive damages or, in the alternative, the award of punitive damages in a ratio of nearly 5:1 with compensatory damages was excessive. App.65a-103a. The trial court, however, refused to either set aside or reduce this punitive damages award, and adopted verbatim the arguments advanced by plaintiff in an order denying Petitioners' post-trial motion challenging the punitive damage award.

First, reasoning that "intentional" discrimination was sufficient to impose punitive damages, the trial court stated, "The jury heard evidence at trial that Mr. Frye was terminated when he was 62 years old and replaced by a 34 year old. That fact alone is sufficient to create an inference for the jury that the defendant intentionally terminated Mr. Frye on the basis of his age in disregard of his rights under the Human Rights Act." App. 24a. In other words, the trial court held that once an age discrimination plaintiff establishes that he or she was replaced by someone under the age of forty, such proof is

sufficient to establish the "intent" required for the award of punitive damages.

Second, reasoning that evidence of "pretext" was sufficient to impose punitive damages, the trial court stated that such things as evidence that Ms. Elliott allegedly had less human resources experience than the plaintiff; Ms. Elliott had received only one day of Sarbanes-Oxley training; Ms. Szakacs had no prior employment experience with Terex; plaintiff was not terminated for poor job performance, for breaches of confidentiality, or for misstatements on his job application; and plaintiff was not considered for an alleged accounting vacancy that was never filled, indicated Petitioners "gave the jury multiple, conflicting 'reasons' for the Plaintiff's termination" and "attacked the Plaintiff's character" as part of an effort to "cover up" their discrimination. App.24a-28a.

Although the trial court acknowledged that "the mere existence of a discriminatory discharge does automatically give rise to a punitive damages claim," it reasoned that "an *intentional* discriminatory discharge *does* give rise to a punitive damages claim." App.28a. Its definition, however, of what constitutes "intentional" discrimination warranting the imposition of punitive damages does not comport with due process: "The evidence of pretext and the evidence of multiple reasons given for defendants' actions support a finding of intentional discrimination by defendants. . . ." App.29a. Of course, under this analysis, every case in which an employer's non-discriminatory reason is rejected as pre-textual would give rise to

punitive damages because it could be characterized as a "cover up," a "character attack," and "egregious conduct."

Finally, with respect to the ratio of punitive to compensatory damages, the trial court held:

> In this case, the ratio of punitive damages to compensatory damages (not including mandatory prejudgment interest on the back pay award, which is a form of compensatory damage) is approximately 4.57 to 1. . . . In this case, as discussed above, it is clear that the jury could have reasonably found that the defendants intentionally and maliciously terminated the Plaintiff's employment on the basis of his age. The jury could have also reasonably found that the defendants misrepresented the reasons for the Plaintiff's termination in order to cover up their illegal motive. There is evidence that to cover up their illegal motive the defendants attacked the Plaintiff's character by questioning his integrity and denigrating his work ethic. Thus, it is clear that the jury could have reasonably concluded that the defendants had an "actual intention to cause harm" as contemplated by *TXO*.

App.31a-32a. In other words, because the jury determined that plaintiff was the victim of age discrimination and presumably rejected the non-discriminatory reasons offered for the Petitioners' decision as pretextual, and because the Petitioners presented evidence to rebut plaintiff's evidence that he was an

exceptional employee, the threshold for the imposition of punitive to compensatory damages in a ratio of nearly 5:1 was satisfied.

C. Petition for Appeal.

Petitioners filed a timely petition for appeal with the Supreme Court of Appeals of West Virginia arguing, *inter alia*, that the award of punitive damages and their ratio to punitive damages violated the Due Process Clause of the Fourteenth Amendment, but it was denied without comment, App.60a-61a.

REASONS FOR GRANTING THE WRIT

This Court has long cautioned that "[p]unitive damages pose an acute danger of arbitrary deprivation of property." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994). In recent years, the Court has either struck down or articulated doubts about punitive damages awards on several occasions.

In *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), the Court held that a $2 million punitive award was unconstitutionally excessive, explaining that "a lesser deterrent" would suffice to satisfy the State's interest in deterring misconduct. 517 U.S. at 584. Five years later, the Court expressed grave doubts about the propriety of a $4.5 million punitive award, observing that the court of appeals' ruling upholding the award was based on "a series of

questionable conclusions by the District Court" that "likely" could not be sustained on a "thorough, independent review" of the record. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 441 (2001). Two years after that, the Court held a $145 million punitive award unconstitutionally excessive, stating that "a more modest punishment for this reprehensible [fraudulent] conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419-20 (2003). In all, the Court suggested that "a punitive damages award at or near the amount of compensatory damages," which were $1 million, was the likely constitutional maximum. *Id.* at 429.

In these and other cases, the Court articulated a range of concerns about punitive damages.

First, although punitive damages "serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding." *State Farm*, 538 U.S. at 417.

Second, civil juries are typically subject to few constraints, lack the expertise and perspective of regulators, and may harbor sympathies toward local plaintiffs. This creates a severe risk that the jury will choose an amount of punitive damages that is "tantamount to a severe criminal penalty" (*BMW*, 517 U.S. at 585) and that dwarfs "the size of such awards in the 18th and 19th centuries," even after adjusting for

inflation (*Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007).

Third, "[t]o the extent an award is grossly excessive, it furthers no legitimate purpose[,] * * * constitutes an arbitrary deprivation of property," and violates "'elementary notions of fairness.'" *State Farm*, 538 U.S. at 417 (*quoting BMW*, 517 U.S. at 574); see also *Philip Morris*, 549 U.S. at 352 (emphasizing the risk that a State's punitive damages system "may deprive a defendant of fair notice of the severity of the penalty that a State may impose" and "threaten arbitrary punishments, i.e., punishments that reflect not an application of law but a decisionmaker's caprice") (internal quotation marks and ellipses omitted).

Fourth, if a punitive award is "sufficiently large," it may, in practical effect, "impose one State's (or one jury's) policy choice * * * upon neighboring States with different public policies." *Philip Morris*, 549 U.S. at 352-53 (internal quotation marks omitted).

Because of these concerns, the Court "has found that the Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as 'grossly excessive.'" *Philip Morris*, 549 U.S. at 353. Most important for present purposes, the Court has held that the Due Process Clause prohibits the imposition of punitive damages in amounts that are excessive in relation to the State's interests in retribution and deterrence. More particularly, "punitive damages

should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm*, 538 U.S. at 419. And even when it is determined that some amount of punitive damages is necessary, the question remains "whether a lesser deterrent would have adequately" served the State's interests. *BMW*, 517 U.S. at 584; see also *State Farm*, 538 U.S. at 419-20 ("a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further"); cf. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2633 (2008) (recognizing "need to protect against the possibility * * * of [punitive] awards that are unpredictable and unnecessary, either for deterrence or for measured retribution").

This required inquiry necessitates careful scrutiny of the absolute amount of the punitive damages. To assist the lower courts in conducting that scrutiny, this Court has identified three guideposts: (i) the degree of reprehensibility of the misconduct; (ii) the ratio of the punitive damages to the harm to the plaintiff (typically measured by the compensatory damages); and (iii) the civil fines authorized or imposed for similar conduct. *BMW*, 517 U.S. at 574-85.

The first guidepost requires courts to ask whether the conduct is heinous enough to warrant the amount of punishment imposed. In other words, the "punishment should fit the crime." *BMW*, 517

U.S. at 575 n.24. It therefore is not sufficient to ask "Is the conduct bad?"; the conduct has to be egregious to warrant any punitive damages in the first place. Moreover, while necessary, it does not suffice to ask "How does this conduct compare to other punishable conduct?" Instead, for this guidepost to serve as a constraining force, courts must also ask whether "the extraordinary size of the award * * * is explained by the extraordinary wrongfulness of the defendant's behavior" (*id.* at 595 (Breyer, J., concurring)).

The second guidepost is designed to ferret out punitive awards that are so disproportionate to the harm caused by the misconduct as to render their reasonableness suspect. Of course, in many cases "the ratio [of punitive damages to harm] will be within a constitutionally acceptable range, and remittitur will not be justified on this basis." *BMW*, 517 U.S. at 583. But that in no way means that punitive awards that are comparatively small multiples of the compensatory damages are immune from invalidation. As this Court has emphasized, "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *State Farm*, 538 U.S. at 426. An award that is the same size as or lower than the compensatory damages might not be disproportionate, but it still could be unreasonable in light of the facts and circumstances, which include the extent to which the compensatory damages and other costs incurred by the defendant as a result of its conduct already serve to punish and deter.

The third guidepost addresses three significant concerns. First, principles of comparative institutional competence warrant giving "substantial deference" to "legislative judgments concerning appropriate sanctions for the conduct at issue." *BMW*, 517 U.S. at 583 (internal quotation marks omitted). Second, the magnitude of applicable civil penalties bears on whether the defendant had "fair notice" of the size of the punishment to which it could be subjected. *Id.* at 584. Finally, this guidepost accounts for the fact that juries lack the expertise, perspective, and resources of expert regulatory agencies. When exercising their sanctioning powers, regulatory agencies have the time, expertise, and resources to conduct a full and impartial investigation. They also have knowledge of the regulatory backdrop and of the spectrum of punishable conduct, which enables them to "assure the uniform general treatment of similarly situated persons that is the essence of law itself" (*Cooper Indus.*, 532 U.S. at 436 (internal quotation marks omitted)). Consideration of the penalties provided by statute and, even more importantly, the expert agency's actual fining practice, is therefore essential in determining whether the punitive damages exceed the amount reasonably necessary to punish and deter.

Used properly, the three guideposts are well suited to their assigned task of assisting courts in determining whether a punitive award is excessive in relation to the State's legitimate interests in retribution and deterrence. Regrettably, this case and others reflect that many lower courts have lost sight

of this ultimate inquiry and accordingly need further guidance on the purpose and proper application of the guideposts.

A. This Court Should Grant Review to Clarify the Degree of Reprehensibility Required for the Imposition of Punitive Damages.

Under the terms of the West Virginia Human Rights Act, W. Va. Code § 5-11-1 *et seq.*, there is no express provision for the award of punitive damages. Rather, in Syllabus Point 5 of *Haynes v. Rhone-Poulenc, Inc.*, 206 W. Va. 18, 521 S.E.2d 331 (1999), it was held, "Punitive damages are an available form of remedial relief that a court may award under the provisions of W. Va. Code, 5-11-13(c) [1998]."

With respect to the standard that applies in a discrimination case, the Supreme Court of Appeals of West Virginia has held that punitive damages can be awarded where defendants act with "malice, oppression, or [with] wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others." *Peters v. Rivers Edge Mining, Inc.*, 224 W. Va. 160, 190, 680 S.E.2d 791, 821 (2009) (internal citations and quotation marks omitted).

And, the jury in this case was instructed "you may award punitive damages only if the plaintiff has proven by a preponderance of the evidence that the defendants acted with malice, oppression, or with wanton, willful, or reckless conduct or indifference to

the rights of the plaintiff." 7 Tr. 40-41. The jury was also instructed, "The mere existence of a discriminatory discharge will not automatically give rise to the right to punitive damages. The plaintiff must prove further egregious conduct on the part of the employer." 7 Tr. 41.

Of course, the problem is not with the instructions or the standards provided to the jury, which were very similar, for example, to the standards discussed by this Court in *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999), that apply to punitive damage awards under the Civil Rights Act of 1991. See also *Atlantic Sounding Co., Inc. v. Townsend*, 129 S. Ct. 2561, 2575 (2009) ("punitive damages . . . for the willful and wanton disregard of the maintenance and cure obligation"). Rather, the problem is with rubber-stamping punitive damage awards by equating liability for compensatory damages with liability for punitive damages.

Here, with respect to what was required for a punitive damage award, plaintiff's counsel told the jury in closing argument: "The next and last portion of this [verdict form] is punitive damages. What they do – the Judge says if it was willful, in other words, if they knew what they were doing." 7 Tr. 75. So, although paying lip service to the proper standards in the instructions, counsel argued what the trial court later held in his post-trial punitive damage order, i.e., a finding of discrimination is sufficient to warrant the imposition of punitive damages.

Moreover, during closing, in order to appeal to a West Virginia jury's bias against out-of-state corporations, plaintiff's counsel argued:

> Tomorrow morning up in Connecticut they'll be talking about you. They'll talk about this case. And if you don't award a significant number in punitive damages, they'll laugh at you. . . . They caught us red-handed, and then this jury gave something like a small half a million dollars or something in punitive. They will laugh.

7 Tr. 77.[6] Certainly, punitive damages serve the legitimate purpose of punishing and deterring reprehensible conduct, but the argument of plaintiff's counsel went well beyond seeking punishment for conduct and ventured into punishment for being incorporated somewhere other than West Virginia.

It is precisely because punitive damages are subject to these types of abuses that this Court has required exacting post-trial review under the Due Process Clause of the Fourteenth Amendment. Where, however, trial judges are elected by partisan ballot, and a defendant is an out-of-state corporation, there may be considerable pressure to find reprehensible conduct where it does not exist.

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[6] Plaintiff's counsel also told the jury, "He was replaced by a lady named Wendy Elliott. . . . Ms. Elliott, you'll hear, had never worked in West Virginia. Ms. Elliott, you'll hear, had never even been to West Virginia. Ms. Elliott had never driven through West Virginia." 2 Tr. at 18.

As this Court has explained, "[p]unitive damages aside," "[d]eterrence * * * operates through the mechanism of damages that are compensatory." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306-07 (1986); see also 1 Dan B. Dobbs, LAW OF REMEDIES § 3.1, at 282 (2d ed. 1993) ("[e]ven if the defendant is not subject to punitive damages, an ordinary compensatory damages judgment can provide an appropriate incentive to meet the appropriate standard of behavior"). Accordingly, "punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm*, 538 U.S. at 419.

Here, even though he had been employed for only nine months prior to the elimination of his position, plaintiff was awarded $59,420 in back pay, $243,860 in front pay, and $25,000 for emotional distress. App.63a. Additionally, his attorneys were awarded $95,846.50 in attorney fees and $8,125.42 in litigation costs. App.58a.

Unfortunately, like many other courts, the trial court in this case affirmed the award of punitive damages of $1.5 million, in addition to the award of compensatory damages, by essentially treating reprehensibility as a self-fulfilling prophesy. As long as the evidence, construed in a light most favorable to the plaintiff, might be labeled "reprehensible," and warranted submission of punitive damages to the jury, many courts automatically affirm any award.

But this Court has held that judicial review of reprehensibility must be *de novo* and "[e]xacting" to "ensur[e] that an award of punitive damages is based upon an application of law, rather than a decision-maker's caprice." *State Farm*, 538 U.S. at 418 (quotations omitted). That process entails deference to "specific findings of fact" by the jury, *Cooper Indus.*, 532 at 440 n.12, but does not permit the court to abdicate its role by deferring to the worst view of the evidence the jury could possibly have believed, which is what occurred in this case. Here, of course, the jury made no specific reprehensibility finding.

In *Exxon Shipping*, this Court refused to defer to potential jury conclusions not embodied in a specific finding, rejecting plaintiffs' argument that it was "entirely possible that the jury found Exxon reckless in its own right." 128 S. Ct. at 2615 n.3. Unfortunately, many courts, as here, defer to the worst possible view of the evidence when conducting reprehensibility analysis.[7] Others, however, hold that courts are required to "mak[e] an independent assessment of the reprehensibility of the defendant's conduct." *Simon v. San Paolo U.S. Holding Co.*, 35

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[7] See, e.g., *Zimmerman v. Direct Fed. Credit Union*, 262 F.3d 70, 82 (1st Cir. 2001); *Fabri v. United Techs. Int'l, Inc.*, 387 F.3d 109, 126 (2d Cir. 2004); *Estate of Moreland v. Dieter*, 395 F.3d 747, 757 (7th Cir. 2005); *United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1232 (10th Cir. 2000); *So. Pine Elec. Coop. v. Burch*, 878 So. 2d 1120, 1129 (Ala. 2003); *Madeja v. MPB Corp.*, 149 N.H. 371, 387 (2003).

Cal. 4th 1159, 1172 (2005).[8] And a broad array of state and federal appellate courts have reviewed the trial court's independent reprehensibility findings, rather than reviewing hypothesized findings that juries could have made.[9]

This conflict among courts goes to the heart of this Court's punitive damages jurisprudence and should be resolved by reminding courts that the entire point of the reprehensibility inquiry is to determine whether the conduct was "*especially* or *unusually* reprehensible enough to warrant" the amount of punishment imposed (*BMW*, 517 U.S. at 590 (Breyer, J., concurring)), an exercise that requires, particularly in the absence of any specific jury findings, an independent review of the evidence.

Similarly, many lower courts have failed to appreciate the relevance of the third guidepost. A punitive award that is significantly greater than the

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[8] See also *In re Exxon Valdez*, 270 F.3d 1215, 1240 (9th Cir. 2001) ("The test of whether a punitive damages award survives review cannot be merely whether there is any evidence to support it. . . .").

[9] See, e.g., *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1147-55 (Utah 2001), *rev'd*, 538 U.S. 408 (2003); *Action Marine, Inc. v. Cont'l Carbon, Inc.*, 481 F.3d 1302, 1319-20 (11th Cir. 2007); *Clark v. Chrysler Corp.*, 436 F.3d 594, 600-06 & n.7 (6th Cir. 2006); *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 232 (3d Cir. 2005); *Seltzer v. Morton*, 336 Mont. 225, 286-93 (2007); *Int'l Union of Operating Eng'rs, Local 150 v. Lowe Excavating Co.*, 225 Ill. 2d 456, 470-83 (2006); *Wolf v. Wolf*, 690 N.W.2d 887, 892-94 (Iowa 2005).

criminal fines that could be imposed for more serious conduct after a defendant has been provided with the full panoply of criminal-procedure safeguards is surely one that grossly exceeds the amount reasonably necessary to punish and deter. The same is true of a punitive award that far exceeds the range of civil penalties typically imposed by regulatory agencies after conducting thorough and expert investigations.

Yet the overwhelming majority of courts have disregarded the third guidepost precisely because the punitive damages are much larger than the fines doled out in the criminal and administrative forums or because the conduct at issue isn't serious enough to be subject to criminal or administrative sanctions.[10]

For example, under the West Virginia Human Rights Act, the maximum civil penalty for its violation, including acts of "[p]hysical force," "violence," "[d]amage to, destruction of or trespass on property," "which is motivated by race, color, religion, sex, ancestry, national origin, political affiliation or disability," is "not more than five thousand dollars per violation." W. Va. Code § 5-11-20. Likewise, even if

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[10] See, e.g., *ConAgra, Inc. v. Turner*, 776 So. 2d 792, 798 (Ala. 2000) (per curiam); *BMW of N. Am., Inc. v. Gore*, 701 So. 2d 507, 514 (Ala. 1997); *Aken v. Plains Elec. Generation & Transmission Co-op.*, 49 P.3d 662, 672 (N.M. 2002); *Santos v. STS Enters., Inc.*, 2005 WL 3776321, at *7 (N. Mar. I. 2005); *James v. Horace Mann Ins. Co.*, 638 S.E.2d 667, 672 (S.C. 2006); *Schwigel v. Kohlmann*, 694 N.W.2d 467, 475 (Wisc. Ct. App. 2005); *Campbell*, 98 P.3d at 419; *Sherman v. Kasotakis*, 314 F. Supp. 2d 843, 875-76 (N.D. Iowa 2004).

someone is convicted of "knowingly violat[ing] a preliminary, temporary or permanent injunction" issued to prevent violation of the Human Rights Act, the criminal penalty is "not more than five thousand dollars, or imprison[ment]" of "not more than one year, or both fined and imprisoned." *Id.* Yet, in this case, punitive damages that are 300 times the amount that could be administratively or criminal assessed have been imposed.

The misconduct alleged in this case – age discrimination – is certainly unlawful and subjects its violator to the payment of compensatory damages, but Petitioners acted without malice and handled the matter with sensitivity, informing plaintiff of their decision off-premises, allowing him to continue to remain in his position during a period of transition, and offering him a generous severance package beyond that required by the company's written policies and procedures. Ultimately, however, Petitioners were punished not for any action taken with respect to plaintiff's employment, but for defending themselves against what they believed were unfounded allegations of disability discrimination, upon which they prevailed, and age discrimination, upon which plaintiff prevailed.

B. This Court Should Grant Review to Require the Reduction of the Punitive Damage Award.

As with the misapplication of the first and third guideposts, the trial court and other courts are misapplying the second guidepost established by this Court for the post-trial review of punitive damage awards. Specifically, like the court below, numerous lower courts have treated a low ratio of punitive to compensatory damages as a safe harbor, upholding significant punitive awards without regard to the degree of reprehensibility of the conduct or the extent to which the compensatory damages and other costs borne by the defendant as a result of its conduct already serve the interests of retribution and deterrence.[11]

In *Exxon Shipping Co.*, this Court enforced a 1:1 limit on punitive damages in admiralty cases involving reckless conduct and substantial damages. *Exxon* was a federal common law decision, but it drew heavily on due process precedents and this Court suggested that 1:1 might well have been "the constitutional outer limit" as well. *Id.* at 2634 n.28. This

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[11] See, e.g., *Cambio Health Solutions, LLC v. Reardon*, 234 F. App'x 331, 339 (6th Cir. 2007); *Stogsdill v. Healthmark Partners, L.L.C.*, 377 F.3d 827, 833 (8th Cir. 2004); *Greenberg v. Paul Revere Life Ins. Co.*, 91 F. App'x 539, 542 (9th Cir. 2004); *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1044 (9th Cir. 2003); *Seltzer*, 154 P.3d at 611; *Bocci v. Key Pharms., Inc.*, 76 P.3d 669, 675 (Or. Ct. App.), modified, 79 P.3d 908 (Or. Ct. App. 2003); *Campbell*, 98 P.3d at 418.

Court also emphasized that it was "skeptical" of "verbal formulations" as a means of enforcing reasonable consistency, and that it was "doubtful that anything but a quantified approach will work." *Id.* at 2628.

In this case, as discussed, Petitioners are unable to identify how their conduct warranted any punitive damage award, let alone one nearly 5 times the amount of compensatory damages awarded. Accordingly, this Court should grant review to clarify that a 1:1 ratio is the "outer limit" when compensatory damages are adequate to deter similar conduct and when the conduct is at the very low end of the spectrum of reprehensibility.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 19, 2010

IN THE CIRCUIT COURT OF
BOONE COUNTY, WEST VIRGINIA

DANNY L. FRYE,

Plaintiff,

v.

SUPERIOR HIGHWALL MINERS, INC., a Delaware corporation; TEREX CORPORATION, a Delaware Corporation,

Defendants.

CIVIL ACTION NO.: 08-C-16

ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW

On a prior day came the Plaintiff, Danny L. Frye, by counsel, Mark A. Atkinson, and Harry M. Hatfield, and came the defendants, Superior Highwall Miners, Inc. and Terex Corporation, by counsel, A. Neal Barkus and Timothy R. Conaway, for a hearing on defendants' Motion For Judgment As A Matter of Law.

Following a full and complete review of the relevant evidence, an examination of defendants' Motion (and the memoranda both for and against), consideration of the evidence of the case, an inspection of relevant portions of the Court file, argument of counsel and analysis of the issues presented, the Court makes the following findings of fact and conclusions of law:

1. Defendant has moved this Court, pursuant to Rule 50(b) of the West Virginia Rules of Civil Procedure, for Judgment as a Matter of Law.

2. The applicable legal standard governing defendants' Motion is as follows:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

West Virginia Rule of Civil Procedure 50(a)(1).

> Upon a motion to direct a verdict for the defendant, every reasonable and legitimate inference fairly arising from the testimony, when considered in its entirety, must be indulged in *favorably to plaintiff*; and the court must assume as true those facts which the jury may properly find under the evidence.

Syl.pt.1, *Jividen v. Legg*, 161 W.Va. 769, 245 S.E.2d 835 (W.Va. 1978) (emphasis added).

3. In the related context of a motion for summary judgment in a case premised upon violation of

the West Virginia Human Rights Act, Justice Cleckley has stated:

> In *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995), we cautioned circuit courts to be particularly careful in granting summary judgment in employment discrimination cases. Although we refuse to hold that simply because motive is involved that summary judgment is unavailable, the issue of discriminatory animus is generally a question of fact for the trier of fact, especially where a prima facie case exists. The issue does not become a question of law unless only one conclusion could be drawn from the record in the case.

Conrad v. ARA Szabo, 198 W. Va. 362, 370, 480 S.E.2d 801, 809 (1996).

4. At trial the Plaintiff prevailed on his cause of action for age discrimination in violation of the West Virginia Human Rights Act. Specifically, the jury ruled that the defendants committed an unlawful discriminatory practice against Danny Frye on the basis of his age.

5. Defendants make two arguments in support of their Motion for Judgment as a Matter of Law: 1) the Plaintiff did not establish a prima facie case of age discrimination with respect to his termination; and 2) the Plaintiff did not establish a prima facie case of age discrimination with respect to defendants' failure to hire him for another position. The Court

will address the two issues raised by defendants' Motion in turn.

6. As the Court has already determined twice before, the Plaintiff presented sufficient evidence for the jury to conclude that the defendants terminated Danny Frye on the basis of his age in violation of the West Virginia Human Rights Act. The Court first denied Defendants' Motion for Summary Judgment pre-trial, finding that Plaintiff had established a prima facie case of age discrimination. The defendants had the opportunity to move for judgment as a matter of law at the end of Plaintiff's case-in-chief on the age discrimination claim, but declined to do so. Finally, at the close of evidence in the case, defendants moved for judgment as a matter of law. The Court again denied defendants' motion as it found that Plaintiff had, again, established a prima facie case of age discrimination.

7. To state a prima facie case of age discrimination under the Act, a plaintiff must provide evidence of the following:

1. That the plaintiff is a member of the protected class;

2. That the employer made an adverse decision concerning the plaintiff; and

3. But for the plaintiffs protected status, the adverse decision would not have been made.

Syl.Pt.2, *Conaway v. Eastern Associated Coal Corp.* 178 W. Va. 164, 358 S.E.2d 423 (1986).

8. In the present case, the defendants admit that the Plaintiff satisfies the first two elements of the test because he was over the age of forty and was terminated from his employment. To establish the third element, the Plaintiff must "show circumstances giving rise to an inference of discrimination." Syl.Pt.4, *Hanlon v. Chambers,* 195 W. Va. 99, 464 S.E.2d 741 (1995). Importantly, "the showing the plaintiff must make as to the elements of the prima facie case in order to defeat a motion for summary judgment [or judgment as a matter of law] is *de minimis.*" *Id.* (emphasis added). The Plaintiff has met his *de minimis* burden in this case.

9. One way in which a plaintiff in an age discrimination case may create an inference of discrimination necessary to establish the third prong of his prima facie case is to show that he was replaced by a person outside the protected class. *Barefoot v. Sundale Nursing Home,* 193 W. Va. 475, 485, 457 S.E.2d 152, 162 (1995) (if plaintiff was a competent employee and was replaced by someone outside her protected class, that fact, "standing alone, create[s] an inference of discrimination."); *See Potence v. Hazleton Area School Dist.,* 357 F.3d 366 (3rd Cir. 2004) (ADEA); *Erenberg v. Methodist Hosp.,* 357 F.3d 787 (8th Cir. 2004) (ADEA); *McClaren v. Morrison Management Specialists, Inc.,* 2004 WL 1005384 (Texas Human Rights Act). In this case the jury heard evidence that the Plaintiff was replaced by someone

outside his protected class, Wendy Elliott, who was thirty-four years old.[1] This obviously created an inference of discrimination. Accordingly, defendants' Motion for Judgment as a Matter of Law with respect to the Plaintiff's age discrimination termination must be denied.

10. Moreover, the stark difference in age of Plaintiff's replacement was not the only evidence of age discrimination. Shortly after taking over from SHM, Terex sought out records of each employee's date of birth. The reason given for the request of this information was that it was used to assess the insurance coverage and calculate costs. However, the Plaintiff testified that Terex would not have needed this information for insurance purposes as the insurance contract had just been negotiated the month before and the contract was for a full year. Further, there was evidence introduced at trial that in order to do a benefit cost projection Terex would have also needed information concerning the employees' beneficiaries – but it did not ask for that information. Accordingly, as the information was

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[1] Defendants argue that the Plaintiff was not replaced by Wendy Elliott. However, the evidence is undisputed that the Plaintiff was terminated from his position as human resources manager and that Wendy Elliott was subsequently hired as human resources manager. The defendants argued that Mrs. Elliott did not assume all of the Plaintiff's prior duties. However, whether the Plaintiff was replaced by Mrs. Elliott was a classic question of fact for a jury to consider.

unnecessary to any legitimate inquiry by Terex, an inference of discrimination was raised.

11. Further, there was sufficient evidence introduced at trial for the jury to conclude that the reasons given for the Plaintiff's termination were pretextual. Plaintiff was told he was not "a fit" for Terex in that he did not have enough human resources experience and was not trained in Sarbanes-Oxley Act compliance. However, there was evidence at trial that the Plaintiff had thirty-five years experience in human resources while Wendy Elliott had fifteen or sixteen years of such experience. Further, Wendy Elliott testified the only training she had in Sarbanes-Oxley Act compliance was training she had received from Terex in less than eight hours in one day. This is training that could have easily been given to the Plaintiff. Thus, the jury could have reasonably concluded that the reasons given for replacing the Plaintiff with Wendy Elliott were pretextual. Importantly, the West Virginia Supreme Court of Appeals has held that "proof of pretext can by itself sustain a conclusion that the defendant engaged in unlawful discrimination." Syl.pt.5, *Skaggs v. Elk Run Coal Co., Inc.*, 198 W.Va. 51, 479 S.E.2d 561 (1996).

12. Another reason offered for replacing the Plaintiff with Wendy Elliott was that defendants wanted someone in the position who had Terex experience. However, after Wendy Elliott left the position she was replaced by someone outside of Terex who had no Terex experience. Of course, given this

evidence a jury could properly conclude that Terex experience was not a necessary qualification for human resource managers at Terex and that this reason was instead a pretext for discrimination. Thus, an inference of discrimination was raised from this evidence as well.

13. The defendants offered yet another reason at trial for the Plaintiff's termination – a breach of confidentiality. Defendants alleged that the Plaintiff had previously broken company policy by breaching confidentiality with respect to salary information. At trial, the defendants' representatives alternatively testified that the alleged misconduct had nothing to do with the Plaintiff's termination yet was in the back of their minds when deciding the Plaintiff's fate. Defendant's counsel questioned six to eight witnesses concerning the circumstances surrounding the alleged breach of confidentiality. Defendants also alleged that the Plaintiff took too much overtime and intimated to the jury that the Plaintiff did not work very hard. Finally, the defendants alleged that the Plaintiff had not been truthful on his application for employment and questioned his honesty and integrity at trial. The defendants invited the jury to conclude that these allegations were reasons for the Plaintiff's termination.

14. It is clear from the evidence that the jury could have reasonably concluded that the defendants gave multiple, conflicting reasons for the Plaintiff's termination. From this evidence the jury could conclude that the reasons given by the defendants for

the Plaintiff's termination had changed over time. The Court notes that it does not agree with defendants' contention that they "consistently gave the Plaintiff the same explanation and maintained that same explanation throughout the post-termination period and at trial." (Defendants' Reply Brief on Punitive Damages at 3). As the jury was instructed, if it determined that the reasons given for Plaintiff's termination changed over time or that the defendants gave different versions of these reasons, the jury could conclude that the reasons given by the defendants were not the true reasons for the decision. *See E.E.O.C. v. Ethan Allen, Inc.,* 44 F.3d 116, 120 (2nd Cir. 1994); *Hossani v. Western Missouri Medical Center,* 97 F.3d 1085, 1089 (8th Cir., 1996); *Kobrin v. University of Minnesota,* 34 F.3d 698, 703 (8th Cir. 1994); *Newhouse v. McCormick & Co., Inc.,* 110 F.3d 635, 640 (8th Cir. 1997); *Payne v. Norwest Corp.,* 113 F.3d 1079 (9th Cir. 1997); *Thurman v. Yellow Freight Systems, Inc.,* 90 F.3d 1160, 1167 (6th Cir. 1996); *Tomsaic v. State Farm Mut. Auto Ins. Co.,* 85 F.3d 1472, 1479 (10th Cir. 1996); *see also,* West Virginia Employment Law Letter, Vol. 4, No. 11, May 1999. Of course, from this an inference of discrimination is created.

15. Defendants argue that because Danny Frye was hired by SHM at age 61 and was terminated less than a year later, an inference arises that age was not a motivator in the decision. Defendants cite *Johnson v. Killmer,* 219 W. Va. 320, 633 S.E.2d 265 (2006), for the proposition that such an inference may be

created. However, there is a crucial difference between the facts of *Johnson* and the present case: the entity that terminated the Plaintiff is not the same entity that hired him. In *Johnson* the plaintiff was hired and fired by the same entity. Here, Plaintiff was hired by SHM. Subsequently, Terex took over SHM and eventually decided to terminate the Plaintiff's employment. Accordingly, the inference referred to in *Johnson* is not applicable to the present case.

16. Given the above, it is clear that the Plaintiff presented sufficient evidence at trial to support an inference that he was terminated on the basis of his age. Accordingly, defendants' Motion for Judgment as a Matter of Law is hereby DENIED.

17. Next the Court will consider the defendants only remaining argument: that the Plaintiff failed to establish a prima facie case of defendants' failure to consider the Plaintiff for other positions on the basis of his age. Plaintiff and Defendant disagree concerning the elements of a prima facie case for this type of discrimination. Defendant argues that the 1983 case of *Shepherdstown Volunteer Fire Dept. v. West Virginia Human Rights Comm'n,* 172 W. Va. 627, 309 S.E.2d 342 (1983), controls the issue. That case states:

> We adopt the framework of *Green* and its progeny and hold that in an action to redress unlawful discriminatory practices in employment and access to "place[s] of public accommodations" under The West Virginia

> Human Rights Act, *as amended*, W.Va.Code, 5-11-1 *et seq.*, the burden is upon the complainant to prove by a preponderance of the evidence a prima facie case of discrimination, which burden ***may*** be carried by showing (1) that the complainant belongs to a protected group under the statute; (2) that he or she applied and was qualified for the position or opening; (3) that he or she was rejected despite his or her qualifications; and (4) that after the rejection, the respondent continued to accept the applications of similarly qualified persons.

172 W.Va. at 637 (emphasis added).

18. Defendants argue that in order to prove a discriminatory failure to hire, a plaintiff *must* establish the four elements contained in the above passage. Defendants' argument ignores the plain language of the case. *Shepherdstown* states that a prima facie case *may* be established by the use of the four referenced elements, not that it must be established in that manner. The wording is important. If the four elements were mandatory in a failure to hire case it would lead to absurd results. For instance, assume a situation where a company has a pool of five applicants for a particular position. Four of them are in their twenties and one is sixty. The sixty year old has superior qualifications. The sixty year old is interviewed and told specifically that the company will not hire him because of his age. Instead, the company hires one of the lesser qualified twenty-year-olds, According to the defendants'

argument the sixty year old could not establish a case of age discrimination because the company did not continue to accept applications, it simply hired one of the individuals who had already applied. Of course, this cannot be the law.

19. Instead, the West Virginia Supreme Court of Appeals has recognized that there are many different ways to create inferences of age discrimination necessary to establish a prima facie case. In *Conaway v. Eastern Assoc. Coal Corp.*, 178 W. Va. 164, 358 S.E.2d 423 (1986), an age discrimination case, the Court realized a problem with the narrow tests that had been developed in cases like *Shepherdstown*.

> Courts need a general test for determining whether the plaintiff has made a prima facie case. At present, if the plaintiff meets one of the narrow tests then he has made a prima facie case, but if the plaintiff fails to meet one of the narrow tests, he may still have a case. There is no way for the court to make an intelligent ruling for or against the plaintiff on a motion for summary judgment, because there are no set factors which a plaintiff *must* prove, only scattered sets of factors which he *may* prove.

178 W.Va. at 170 (emphasis added).

20. After diagnosing the problem, the Court announced a general test with elements a plaintiff *must* prove in order to establish a discriminatory discharge in any situation.

> We, therefore, now propose a general test for determining whether the plaintiff has made a prima facie case of impermissible employment discrimination. In order to make a prima facie case of employment discrimination, the plaintiff *must* prove that:
>
> (1) That the plaintiff is a member of a protected class.
>
> (2) That the employer made an adverse decision concerning the plaintiff.
>
> (3) But for the plaintiffs protected status, the adverse decision would not have been made.

Id.

21. Accordingly, it is apparent that the proper framework for analyzing the Plaintiff's failure to hire claim is the one announced in *Conaway*. The defendant argues that the test in *Conaway* is a "more general *prima facie* test to be used where it fit." (Defendants' Reply Brief at 5). In the present case, this test is more workable and helpful than the *Shepherdstown* test because the factors in the *Shepherdstown* test do not apply to the facts given that the Plaintiff was already an employee of the defendants, there was evidence that no formal application process was necessary and, most importantly, there was evidence that the defendants withheld the information that there were openings in order to deter the Plaintiff from applying. The defendants argue that the only way to prove a

discriminatory failure to hire is through the *Shepherdstown* test. This is simply not true. As is apparent from *Conaway*, the *Shepherdstown* test is simply one way a plaintiff *may* establish an inference of discrimination. Moreover, the defendants cannot hide behind the "application" requirement of *Shepherdstown* when there is evidence that they dishonestly withheld the fact that there were openings in order to deter the Plaintiff from making a formal application.

22. Using the *Conaway* framework, it is apparent that at trial the Plaintiff established a prima facie case of failure to hire on the basis of age discrimination. The first two elements are undisputed. The Plaintiff is a member of a protected class and he was not hired for any of the open accounting positions.

23. The third element was established at trial as well. At the time Plaintiff was informed of his pending termination, he asked if there were any accounting positions available. He asked two members of management about these potential openings. He was informed there were no positions available. However, the evidence was clear at trial that there was a Chief Financial Officer position open. It was being filled by an interim employee. John Olson, Plaintiff's supervisor, testified at trial that the Plaintiff may have been qualified to fill this opening. Ultimately, the job was filled approximately eight months after Plaintiff's termination. Plaintiff had thirty years experience in the mining/accounting field while the

person hired had no such experience. Further, the Plaintiff and the new CFO had the same educational background. Regardless, which individual was more qualified for the position was a classic question of fact for the jury. Moreover, the relevant question is not whether the Plaintiff was more qualified than the new CFO, it is whether the Plaintiff had the qualifications to be considered for the position. It was apparent at trial (from Mr. Olson's own testimony) that he did. From this evidence a jury could easily infer that the reason the Plaintiff was not informed upon his inquiry that there was an opening was because of his age. This is especially true where there is evidence that the Plaintiff was terminated on the basis of his age. Put simply, because there is evidence that the Plaintiff was terminated on the basis of his age and he was incorrectly (or disingenuously) informed that there were no openings for him to apply for, a jury may properly infer that the reason the Plaintiff was not informed of these open positions was because of his age.

24. Further, the evidence at trial supported the following findings: 1) an accounting position was available; 2) the defendants interviewed an accountant before Mr. Frye left defendants' employment; and 3) Frye was competent to fill multiple accounting positions with the defendants. Despite the Plaintiff's inquiry regarding available accounting positions, the Plaintiff was not informed of this opening either. There was no dispute at trial that the Plaintiff was qualified for this position. From this evidence a jury

could easily infer that the reason the Plaintiff was not informed upon his inquiry that there was an opening was because of his age. This is especially true where, as here, there is evidence that the Plaintiff was terminated on the basis of his age.

25. Moreover, although *Shepherdstown* is not the controlling authority, as discussed above, even if it were Plaintiff still established a prima facie case of failure to hire due to age discrimination. First, the Plaintiff was over forty. Second, there was evidence that the Plaintiff applied for the accounting positions as he inquired of his supervisors whether there were any positions available. He was informed, incorrectly, that there were no positions available. Defendants cannot argue that the Plaintiff does not meet the "application" element due to the lack of a formal application. There was no evidence at trial that a formal application was necessary for an existing employee. Moreover, how could the Plaintiff be expected to formally apply for a position when the defendants incorrectly (or disingenuously) apprised him that there were no positions available? Additionally, it is clear from the above facts that the jury had enough evidence from which it could determine that the Plaintiff was qualified for the openings.

26. Third, it is apparent that the Plaintiff was rejected despite his qualifications as he was informed that there were no positions available for him to apply to when, in fact, there was ample evidence for the jury to conclude accounting positions were available. Fourth, the jury could have reasonably

concluded that after the rejection of the Plaintiff's employment inquiry, the defendants continued to accept applications. Approximately eight months after the Plaintiff's termination the CFO position was filled. Shortly after the Plaintiff inquired as to accounting jobs the evidence at trial was clear that the defendants were interviewing for an open accounting position. Thus, for both the CFO position and the general accounting position the Plaintiff met the four elements discussed in *Shepherdstown*. Therefore, by both the *Conaway* and *Shepherdstown* framework the Plaintiff established a prima facie case of failure to hire due to age discrimination. Accordingly, the defendants' Motion for Judgment as a Matter of Law is hereby DENIED.

WHEREFORE, for the above-stated reasons, the Court hereby **DENIES** defendants' Motion For Judgment As A Matter Of Law.

The Court notes the objections of counsel as to those matters adverse to their respective interests.

The Clerk is directed to send certified copies of this Order to all parties or counsel of record.

Entered this 9th day of March, 2009.

/s/ William S. Thompson
THE HONORABLE
WILLIAM S. THOMPSON
Judge of the Circuit Court of
Boone County, West Virginia

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IN THE CIRCUIT COURT OF
BOONE COUNTY, WEST VIRGINIA

DANNY L. FRYE,

Plaintiff,

v.

SUPERIOR HIGHWALL MINERS, INC., a Delaware corporation; TEREX CORPORATION, a Delaware Corporation,

Defendants.

CIVIL ACTION NO.: 08-C-16

ORDER DENYING DEFENDANTS' MOTION FOR ELIMINATION OR REDUCTION OF JURY AWARD OF PUNITIVE DAMAGES

On a prior day came the Plaintiff, Danny L. Frye, by counsel, Mark A. Atkinson, and Harry M. Hatfield, and came the defendants, Superior Highwall Miners, Inc. and Terex Corporation, by counsel, A. Neal Barkus and Timothy R. Conaway, for a hearing on defendants' Motion For Review And Reduction Of Jury Award Of Punitive Damages.

Following a full and complete review of the relevant evidence, an examination of defendants' Motion (and the memoranda both for and against), consideration of the evidence of the case, an inspection of relevant portions of the Court file, application of the factors set forth for the review of punitive damages awards, argument of counsel and analysis of the

issues presented, the Court makes the following findings of fact and conclusions of law:

1. Defendants have moved for "the elimination or substantial reduction" of the punitive damages awarded to the Plaintiff in this matter. However, the evidence at trial supports the award of punitive damages in this case.

2. As noted by the parties, the Court must conduct a post-verdict punitive damages review pursuant to the requirements set forth in *Alkire v. First National Bank of Parsons*, 197 W. Va. 122, 475 S.E.2d 122 (1996) and *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991).

In Syllabus Point 7 of *Alkire*, the Court held:

> Our punitive damage jurisprudence includes a two-step paradigm: first, a determination of whether the conduct of an actor toward another person entitles that person to *a* punitive damage award under *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895); second, if a punitive damage award is justified, then a review is mandated to determine if *the* punitive damage award is excessive under *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991).

(Emphasis in original.) *See also* Syllabus Point 9, *Vandevender v. Sheetz, Inc.*, 200 W.Va. 591, 490 S.E.2d 678 (1997).

3. Thus, this Court's post-verdict review has two components – first, review of plaintiff's entitlement

to punitive damages and then, review of the amount of punitive damages. In describing this process, the Supreme Court of Appeals has observed that, "[o]ur jurisprudence establishes the complimentary roles of the judge and the jury in the area of punitive damages. A short-hand formula for this relationship is: juries decide, judges review." *Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC*, 209 W.Va. 318, 337 n.21, 547 S.E.2d 256, 275 n.21 (2001).

4. Thus, in accordance with the above authority, the Court will first consider the issue of Plaintiff's entitlement to punitive damages. In Syllabus Point 4 of *Alkire*, (as restated in Syllabus Pont 11 of *Vandevender*) the Court reiterated the standard for the type of conduct that justifies an award of punitive damages that *Mayer v. Frobe* had established over a century ago:

> "In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous." Syllabus Point 4, *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895).

5. In the context of a violation of the West Virginia Human Rights Act, the West Virginia Supreme Court has held that punitive damages are an available form of relief that a court may award. Syl.pt.5, *Haynes v. Rhone-Poulene, Inc.*, 206 W. Va. 18, 521

S.E.2d 331 (1999). Thus, in reviewing plaintiff's entitlement to *a* punitive damage award, the Court need only satisfy itself that the jury could reasonably conclude that the defendant's conduct in discharging/failing to hire Danny Frye was "wanton, willful or malicious." Or, as the Court framed the question in *Alkire*: "Do the facts and inferences in this case point so strongly and overwhelmingly in favor of the [defendant] to the extent that it did not act so maliciously, oppressively, wantonly, willfully, recklessly, or with criminal indifference to civil obligations that no reasonable jury could have reached a verdict against the [defendant] on the issue of punitive damages?" 197 W.Va. at 129, 475 S.E.2d at 129.

6. To properly accomplish the initial task of determining whether sufficient evidence existed to meet the type of conduct required under *Mayer v. Frobe* and *Haynes* to justify an award of punitive damages, it is helpful to review the question of what type of conduct constitutes "wanton, willful or malicious" conduct. In *Stone v. Rudolph,* 127 W. Va. 335, 32 S.E.2d 742 (1945), the Court undertook an "investigation as to what is meant by willful and wanton misconduct." *Id.* at 345, 32 S.E.2d at 748.

In *Stone*, the Court observed that:

> Wanton negligence is defined in Black's Law Dictionary, 3rd Ed. 1233, as "Reckless indifference to the consequences of an act or omission, where the party acting or failing to act is conscious of his conduct and, without any actual intent to injure, is aware, from

> his knowledge of existing circumstances and conditions, that his conduct will inevitably or probably result in injury to another." And in the same work on page 1234, it is stated that "'Willful negligence' implies an act intentionally done in disregard of another's rights, or omission to do something to protect the rights of another after having had such notice of those rights as would put a prudent man on his guard to use ordinary care to avoid injury."

Id. at 345-46, 32 S.E.2d at 748.

The Court has also noted that:

> The usual meaning assigned to 'wilful,' 'wanton' or 'reckless,' according to taste as to the word used, is that the actor has *intentionally* done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a *conscious* indifference to the consequences, amounting almost to willingness that they shall follow; and it has been said that this is indispensable.

Cline v. Joy Manufacturing Co., 172 W. Va. 769, 772 n.6, 310 S.E.2d 835, 838 n.6 (1983), quoting W. Prosser, Handbook of the Law of Torts 185 (4th Ed. 1971) (emphasis added by the Court). Additionally, in the context of punitive damages, the Court stated in *Addair v. Huffman,* 156 W.Va. 592, 603, 195 S.E.2d 739, 746 (1973), that, "[t]he foundation of an

inference of malice is *the general disregard of the rights of others*, rather than an intent to injure a particular individual." (emphasis added.)

7. In this case, the jury could reasonably conclude that the defendants specifically disregarded the rights of Danny Frye. The jury heard evidence at trial that Mr. Frye was terminated when he was 62 years old and replaced by a 34 year old. That fact alone is sufficient to create an inference for the jury that the defendants intentionally terminated Mr. Frye on the basis of his age in disregard of his rights under the Human Rights Act. *See Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 485, 457 S.E.2d 152, 162 (1995) (if plaintiff was a competent employee and was replaced by someone outside her protected class, that fact, "standing alone, create[s] an inference of discrimination."); *See Potence v. Hazleton Area School Dist.*, 357 F.3d 366 (3rd Cir. 2004) (ADEA); *Erenberg v. Methodist Hosp.*, 357 F.3d 787 (8th Cir. 2004) (ADEA); *McClaren v. Morrison Management Specialists, Inc.*, 2004 WL 1005384 (Texas Human Rights Act).

8. Given the evidence the jury could have also reasonably found that the defendants were guilty of intentional discrimination in disregard of the Plaintiff's rights by finding that the reasons given for the Plaintiff's termination were pretextual. At trial defendants' representatives testified that the reasons for Mr. Frye's termination were that he lacked human resources experience and was not trained in Sarbanes-Oxley Act compliance.

9. In contrast to that representation, the jury heard evidence that Mr. Frye had approximately 20 more years in human resources experience that Wendy Elliott, the person who replaced him. Moreover, Mrs. Elliott testified that the only Sarbanes-Oxley Act training that she had was the training that she received from Defendant Terex and which lasted less than eight hours in one day.

10. Another reason offered by the defendants to attempt to explain replacing the Plaintiff with Wendy Elliott was that defendants wanted someone in the position who had Terex experience. However, the jury heard evidence that after Wendy Elliott left the position she was replaced by someone outside of Terex who had no Terex experience. Given this evidence a jury could properly conclude that Terex experience was not a necessary qualification for human resource managers at Terex and that this reason was instead a pretext for discrimination.

11. Thus, it is clear from the evidence that a reasonable jury could conclude that the defendants terminated the Plaintiff on the basis of his age and then created a pretext in an attempt to cover up their discrimination. Importantly, the West Virginia Supreme Court of Appeals has held that "proof of pretext can by itself sustain a conclusion that the defendant engaged in unlawful discrimination." Syl.pt.5, *Skaggs v. Elk Run Coal Co., Inc.*, 198 W.Va. 51, 479 S.E.2d 561 (1996).

12. Further, the defendants seemingly offered yet another reason at trial for the Plaintiff's termination – an alleged breach of confidentiality by the Plaintiff. Defendants alleged that the Plaintiff had previously broken company policy by breaching confidentiality with respect to salary information. At trial, the defendants' representatives alternatively testified that the alleged misconduct had nothing to do with the Plaintiff's termination yet was in the back of their minds when deciding the Plaintiff's fate. Defendants' counsel questioned six to eight witnesses concerning the circumstances surrounding the alleged breach of confidentiality. Defendants also alleged that the Plaintiff took too much overtime and intimated to the jury that the Plaintiff did not work very hard. Finally, the defendants alleged that the Plaintiff had not been truthful on his application for employment and questioned his honesty and integrity at trial. The defendants invited the jury to conclude that these myriad allegations were the real reasons for the Plaintiff's termination.

13. From the evidence at trial a reasonable juror could have concluded that in their attempts to justify their conduct, defendants gave the jury multiple, conflicting "reasons" for the Plaintiff's termination. From this evidence the jury could conclude that the "reasons" given by the defendants for the Plaintiff's termination had changed over time. The Court notes that it does not agree with defendants' contention that they "consistently gave the Plaintiff the same explanation and maintained that same

explanation throughout the post-termination period and at trial." (Defendants' Reply Brief at 3). As the jury was instructed, if it determined that the reasons given for Plaintiff's termination changed over time or that the defendants gave different versions of these reasons, the jury could conclude that the reasons given by the defendants were not the true reasons for the decision. *See E.E.O.C. v. Ethan Allen, Inc.*, 44 F.3d 116, 120 (2nd Cir. 1994); *Hossani v. Western Missouri Medical Center*, 97 F.3d 1085, 1089 (8th Cir., 1996); *Kobrin v. University of Minnesota*, 34 F.3d 698, 703 (8th Cir. 1994); *Newhouse v. McCormick & Co., Inc.*, 110 F.3d 635, 640 (8th Cir. 1997); *Payne v. Norwest Corp.*, 113 F.3d 1079 (9th Cir. 1997); *Thurman v. Yellow Freight Systems, Inc.*, 90 F.3d 1160, 1167 (6th Cir. 1996); *Tomsaic v. State Farm Mut. Auto Ins. Co.*, 85 F.3d 1472, 1479 (10th Cir. 1996); *see also*, West Virginia Employment Law Letter, Vol. 4, No. 11, May 1999.

14. Thus, from the evidence above the jury could have properly concluded that the Plaintiff was intentionally terminated due to his age and that defendants then created a pretext in an attempt to cover up their discrimination. Further, the jury could properly conclude that the defendants also attacked the Plaintiff's character in order to justify their illegal actions. The evidence of these intentional acts provide sufficient evidence for a jury to conclude that the defendants engaged in "wanton, willful or malicious" conduct by the defendants and directed toward

the Plaintiff which would support a punitive damages award under the above-cited standards.

15. In their Motion the defendants argue that a finding of discrimination, in and of itself, is not a proper basis for punitive damages. They cite *Harless v. First Nat. Bank in Fairmont*, 169 W. Va. 673, 289 S.E.2d 692 (1982), for the proposition contained in one of defendants' jury instructions that "the mere existence of a discriminatory discharge will not automatically give rise to the right of punitive damages. The plaintiff must prove further egregious conduct on the part of the employer." Defendants Instruction No. 29.

16. The Court agrees that the mere existence of a discriminatory discharge does not automatically give rise to a punitive damages claim. However, consistent with punitive damages jurisprudence, an *intentional* discriminatory discharge *does* give rise to a punitive damages claim. As Justice Cleckley makes clear in *Skaggs v. Elk Run Coal Co., Inc.*, 198 W. Va. 51, 78, 479 S.E.2d 561, 588 (1996), a plaintiff may prevail in a discriminatory discharge case without proving that a defendant acted with a deliberate and specific intent to engage in discrimination. A plaintiff may prevail "if he or she proves that the defendant acted on the basis of some subconscious motive or stereotype about the plaintiff's class." *Id.* In the type of case noted by Justice Cleckley, where a defendant acts without a deliberate and specific intent to engage in discrimination, punitive damages would obviously be inappropriate, thus confirming the principle in

Harless that a discriminatory discharge does not automatically support a punitive damages claim.

17. However, in the present case the jury obviously concluded that the defendants engaged in intentional discrimination. There were no arguments to the jury concerning subconscious motives or stereotypes. The evidence of pretext and the evidence of multiple reasons given for defendants' actions support a finding of intentional discrimination by defendants but not a determination that they were motivated by some subconscious motive.

18. Further, even if the Plaintiff were required to prove "further egregious conduct" beyond an intentional discrimination (which is illogical and counter to well-established punitive damages and employment discrimination jurisprudence), there is evidence of such conduct in this case. There is evidence to support a conclusion that the defendants misrepresented the reasons for the Plaintiff's termination in order to cover up their illegal motive. There is evidence to support a conclusion that the defendants kept changing the reasons for the Plaintiff's termination in order to cover up their illegal motive. There is evidence that to cover up their illegal motive the defendants attacked the Plaintiff's character by questioning his integrity and denigrating his work ethic. Finally, prior to his last day of work the Plaintiff inquired as to whether there were any accounting positions open for him to apply for. At trial, the jury heard evidence that: 1) an accounting position was available; 2) the defendants interviewed an

accountant before Frye left defendants' employment; and 3) Frye was competent to fill multiple accounting positions with the defendants. Nevertheless, the Plaintiff was told that there were no positions available. The fact that the defendants would not even consider the Plaintiff for other positions is further egregious conduct that likewise reveals intentional age discrimination on the part of the defendants. Given the evidence, it is apparent that the record supports the jury's finding that the plaintiff is entitled to an award of punitive damages.

19. Turning to the question of whether the punitive damages awarded were excessive, The Supreme Court of Appeals has repeatedly instructed the circuit courts on the process of post-trial reviews of the amount of punitive damages awards.

> "Every post-trial analysis as to the amount of the punitive damage award should be conducted by the trial court exclusively within the boundaries of Syllabus Points 3 and 4 of *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991), and Syllabus Point 15 of *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992)." Syllabus Point 6, in part, *Alkire v. First Nat. Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122 (1996).

Syllabus Point 2, *Boyd v. Goffoli*, 216 W.Va. 552, 608 S.E.2d 169 (2004). *See also* Syllabus Point 8, *Vandevender*, supra.

20. As the jury was instructed, Syllabus Point 3(1) of *Garnes* requires that punitive damages "bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred." Further, Syllabus Point 3(4) of *Garnes* requires that punitive damages "should bear a reasonable relationship to the compensatory damages." In this case, the jury determined that a compensatory damage award of $328,280.00 represented the harm that actually occurred to Danny Frye. The jury awarded punitive damages of $1,500,00.00. In this case, the ratio of punitive damages to compensatory damages (not including mandatory pre-judgment interest on the back pay award, which is a form of compensatory damage)[1] is approximately 4.57 to 1. The West Virginia Supreme Court of Appeals has held that in cases such as the present one, the ratio of punitive damages to compensatory damages may be much higher than 5 to 1.

> The outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which

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[1] Syllabus Point 1, *Buckhannon-Upshur County Airport Authority v. R & R Coal Contracting, Inc.*, 186 W.Va. 583, 413 S.E.2d 404 (1991) ("Prejudgment interest, according to West Virginia Code § 56-6-31 (1981) and the decisions of this Court interpreting that statute, is not a cost, but is a form of compensatory damages intended to make an injured plaintiff whole as far as loss of use of funds is concerned.").

> compensatory damages are neither negligible nor very large is roughly 5 to 1. However, when the defendant has acted with actual evil intention, much higher ratios are not *per se* unconstitutional.

Syl.pt.15, *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992).

21. In this case, as discussed above, it is clear that the jury could have reasonably found that the defendants intentionally and maliciously terminated the Plaintiff's employment on the basis of his age. The jury could have also reasonably found that the defendants misrepresented the reasons for the Plaintiff's termination in order to cover up their illegal motive. There is evidence to support a conclusion that the defendants kept changing the reasons for the Plaintiff's termination in order to cover up their illegal motive. There is evidence that to cover up their illegal motive the defendants attacked the Plaintiff's character by questioning his integrity and denigrating his work ethic. Thus, it is clear that the jury could have reasonably concluded that the defendants had an "actual intention to cause harm" as contemplated by *TXO*. Accordingly, a ratio higher than 5 to 1 would have been appropriate in this case. Nevertheless, the jury awarded punitive damages with a 4.57 to 1 ratio, below the upper limit for cases of extreme negligence. Therefore the ratio of punitive damages to compensatory damages in this case bears a reasonable relationship to the harm actually caused by defendants' conduct as well as a reasonable relationship to the

compensatory damages. The "reasonable relationship" factor weighs heavily in favor of upholding the jury's punitive damages award. Consider *Vandevender v. Sheetz, Inc.*, supra, where the Court held that, because the employer's conduct in an unlawful termination/failure to rehire case fell into the category of reckless disregard of the employee's rights, rather than malice toward the employee, a five to one ratio of punitive to compensatory damages would be appropriate. *See Boyd v. Goffoli*, supra. (reiterating rule in *TXO* that five to one ratio appropriate when defendant has acted with extreme negligence or wanton disregard).

22. Syllabus Point 3(2) of *Garnes* allows the jury (and, in the context of this review, the Court) to consider the reprehensibility of the defendant's conduct as a factor in determining the amount of punitive damages. Among the reprehensibility factors recognized by *Garnes* are "how long the defendant continued in his actions" and "whether [the defendant] was aware his actions were causing or were likely to cause harm . . . " In the present case, as established above, there was sufficient evidence for the jury to reasonably conclude that defendants intentionally and maliciously terminated the Plaintiff's employment on the basis of his age. There was evidence that defendants misrepresented the reasons for the Plaintiff's termination in order to cover up their illegal motive. There was evidence that defendants kept changing the reasons for the Plaintiff's termination in order to cover up their illegal motive.

Defendants also attacked the Plaintiff's character by questioning his integrity and denigrating his work ethic. The defendants refused to consider the Plaintiff for other open positions despite his qualifications.

23. In their Motion, the defendants argue that they "proceeded carefully to avoid unnecessary harm to the Plaintiff and treated him with the utmost respect at all times." Defendants' Motion at 9. Given the evidence at trial and the jury's verdict, it is apparent that this argument lacks merit. It is evidence that the defendants to this day refuse to recognize the illegality of their actions.

24. Another factor indicating the reprehensibility of defendants' conduct is the evidence that supports a finding that the defendants' intentional conduct was directed toward a target with financial vulnerability. *See Boyd*, 216 W. Va. at 564 (quoting *BMW of North America v. Gore*, 517 U.S. 559 (1996)). The defendants obviously knew that terminating the Plaintiff's employment would cause him substantial economic harm. The testimony of the Plaintiff and his expert economist at trial established the Plaintiff's financial vulnerability.

25. Syllabus Point 3(2) of *Garnes* also permits the Court to consider "whether [the defendant] attempted to conceal or cover up his actions or the harm caused by them . . . " Given the above evidence of pretext and the changing reasons given by the defendants for the Plaintiff's termination, it is clear that the jury could have reasonably found that

defendants attempted to conceal or cover up their actions. Also, given the above-referenced evidence, the jury could have reasonably concluded that the harm to the Plaintiff was the result of intentional malice, trickery or deceit, and not a mere accident. *See Boyd*, 216 W. Va. at 564 (quoting *Gore*, 517 U.S. 559). Therefore, this factor weighs heavily in favor of upholding the jury's punitive damages award.

26. Syllabus Point 3(2) of *Garnes* further allows this Court to consider "whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once [its] liability became clear to [it]." Prior to mediation in this case, Plaintiff's counsel drafted a four-page letter to defendants' counsel outlining Plaintiff's views regarding liability and damages. The letter also included a settlement demand. The letter to defendants' counsel began, "Please allow me to share some thoughts with you concerning this important case." In response, defendants' counsel replied with an email to Plaintiff's counsel as follows:

> Mark, thank you for your settlement demand letter yesterday. It was the only light moment in my otherwise tedious day. To paraphrase the first sentence, please allow me to share the Defendants' Motion For Summary Judgment with you in this important case.

Defendants' counsel then attached defendants' Motion For Summary Judgment to the email.

27. It is clear from the tone of the email that defendants did not take the Plaintiff's settlement demand seriously. The inference drawn from the tone of the email was confirmed by Plaintiff's counsel when the defendants only offered $10,000 in settlement at the mediation. Plaintiff's attorney attempted to negotiate in good faith by drafting a mediation letter describing his thoughts on the case and making a demand. Defendant's counsel belittled the demand and defendants failed to negotiate in good faith at the mediation.

28. Moreover, prior to trial the Court participated in settlement discussions between the parties and suggested that the parties agree to settle the case for $190,000. The defendants refused and instead offered $110,000, $70,000 less than the Court suggested. Given the amount of Plaintiff's compensatory damages ($328,280.00), and the lowball offer at mediation it is apparent that the defendants did *not* make reasonable efforts to make amends by offering a fair and prompt settlement. Therefore, this factor weighs in favor of upholding the jury's punitive damages award.

29. Syllabus Point 3(5) of *Garnes* states that in considering punitive damages awards, "[t]he financial position of the defendant is relevant." In this case, given the financial position of the defendants as evidenced at trial, there is no reason to consider reducing the punitive damages award to avoid undue harm to the defendants. Simply put, the defendants are quite capable of satisfying the judgment against

them in this matter without threat of insolvency. Therefore, this factor weighs in favor of upholding the jury's punitive damages award.

30. Indeed, when considering the *Garnes* factors, a higher punitive award would easily be justified. The actual punitive damages award by the jury in this case is factually and legally sound and appropriate.

WHEREFORE, for the above-stated reasons, the Court hereby **DENIES** defendants' Motion for elimination or reduction of the jury's award of punitive damages.

The Court notes the objections of counsel as to those matters adverse to their respective interests.

The Clerk is directed to send certified copies of this Order to all parties or counsel of record.

Entered this 9th day of March, 2009.

/s/ William S. Thompson
THE HONORABLE
WILLIAM S. THOMPSON
Judge of the Circuit Court
of Boone County,
West Virginia

A COPY ATTEST
/s/ SueAnn ZickeFoose
CIRCUIT COURT

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IN THE CIRCUIT COURT OF
BOONE COUNTY, WEST VIRGINIA

DANNY L. FRYE,

Plaintiff,

v.

SUPERIOR HIGHWALL MINERS, INC., a Delaware corporation; TEREX CORPORATION, a Delaware Corporation,

Defendants.

CIVIL ACTION NO.: 08-C-16

ORDER GRANTING PLAINTIFF'S MOTION FOR ATTORNEY FEES AND COSTS

On a prior day came the Plaintiff, Danny L. Frye, by counsel, Mark A. Atkinson, and Harry M. Hatfield, and came the defendants, Superior Highwall Miners, Inc. and Terex Corporation, by counsel, A. Neal Barkus and Timothy R. Conaway, for a hearing on Plaintiffs' motion for recovery of reasonable attorney fees and litigation costs.

Following a full and complete review of the relevant evidence, an examination of Plaintiff's fee motion (and the memoranda both for and against), consideration of the testimony proffered via affidavits, an inspection of relevant portions of the Court file, application of the factors set forth in *Aetna Casualty & Surety Co., v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d (1986), argument of counsel, and an analysis

of the issues presented, the Court makes the following findings of fact and conclusions of law:

1. At the close of trial of the above-referenced matter, the jury found in favor of Plaintiff Danny L. Frye on his claim that he was discriminated against on the basis of his age in violation of the West Virginia Human Rights Act. (*See* Judgment Order).

2. The jury awarded the Plaintiff $1,828,280 in damages as a result of the defendants' unlawful actions.

3. Accordingly, the Court specifically finds that Plaintiff prevailed in this case.

4. Following the jury verdict in this case, Plaintiff filed a motion for recovery of reasonable attorney fees and litigation costs.

5. Under the provisions of the West Virginia Human Rights Act, a successful litigant may receive an award of attorney fees.

> In actions brought under this section, the court in its discretion may award all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, to the complainant.

W. Va. Code § 5-11-13(c).

6. The West Virginia Supreme Court has stated:

> The goal of the West Virginia human rights law is to protect the most basic, cherished rights and liberties of the citizens of West

> Virginia. Effective enforcement of the human rights law depends upon the action of private citizens who, from our observations of these matters, usually lack the resources to retain the legal counsel necessary to vindicate their rights. Full enforcement of the civil rights act requires adequate fee awards.

Bishop Coal Company v. Salyers, 181 W. Va. 71, 80, 380 S.E.2d 238, 247 (1989).

7. The Supreme Court also recognizes that attorney-fee awards are necessary in order enforce the civil rights laws and attract competent counsel.

> Thus, inherent in any statutory fee award made pursuant to West Virginia Code § 5-11-13(c) is a recognition that the economic incentive provided by such a fee-shifting mechanism is necessary to attract competent counsel for the purpose of enforcing civil rights laws that serve to protect the interest of this state's citizenry.

Syl.Pt.2, *Heldreth v. Rahimian*, 219 W. Va. 462, 637 S.E.2d 359 (2006).

8. As Charleston Attorney David Grubb stated in his Affidavit to this Court, "[i]f it were not for the possibility of recovering fully compensable and reasonable attorney's fees via fee shifting provisions . . . it would be difficult, if not impossible, for attorneys to accept certain cases (such as the one recently handled by Mr. Atkinson's firm)." Clearly, the Legislature sought to encourage lawyers to seek relief for citizens whose basic civil rights are violated and the main

method for encouraging lawyers to take on these difficult cases is to permit an award of attorney's fees and costs.

9. Therefore, in order to accomplish full enforcement of the Human Rights Act and to protect the interests of the citizens of the State, courts should award adequate attorney fee awards to successfully litigants. The facts and circumstances of this case warrant an award of reasonable attorneys' fees and litigation costs to the Plaintiff.

10. "Reasonable attorney's fees" should be determined by (1) multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate – the lodestar calculation – and (2) allowing, if appropriate, a contingency enhancement.[1] Syl.Pt.3, *Bishop*, 181 W. Va. 71. "The general factors outlined in Syllabus Point 4 [of] *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986) should be considered to determine: (1) the reasonableness of both time expended and hourly rate charged; and, (2) the allowance and amount of a contingency enhancement." *Id.*

11. The factors in Syllabus Point 4 of *Pitrolo* are as follows:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service

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[1] Plaintiff did not seek a contingency enhancement.

> properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Nevertheless, "*Bishop* does not contemplate that every factor listed in [*Pitrolo*] be considered in determining the reasonableness of attorneys' fees." *Casteel v. Consolidation Coal Co.*, 181 W. Va. 501, 508, 383 S.E.2d 305, 312 (1989).

12. In support of his Motion, Plaintiff submitted detailed and contemporaneously maintained records revealing that Plaintiffs' counsel, Mark Atkinson (a partner in his firm), spent 137.00 hours on Plaintiff's case. Another partner in the firm, John Polak, spent 12.60 hours on Plaintiff's case. Harry Hatfield of Hatfield & Hatfield, PLLC, a partner in his firm, spent 78.00 hours on Plaintiff's case. Paul L. Frampton, Jr., an associate attorney with Atkinson & Polak, PLLC, spent 35.70 hours on Plaintiff's case. Total paralegal time expended in Plaintiff's case was 22.40 hours. Total costs (including witness fees) expended in Plaintiffs' cases was $8,125.42.

13. As the defendants note in their memorandum, generally attorney fee awards should exclude hours that were devoted to distinct claims for which a Plaintiff does not prevail. *Heldreth v. Rahimian*, 219 W. Va. 462, 637 S.E.2d 359 (2006). In the present case, the Plaintiff prevailed on his age discrimination claim while the defendants prevailed on Plaintiff's claim of disability discrimination. Defendants specifically identify just 17.5 hours which they argue were related to the disability discrimination claim. (Defendants' Memorandum at p.7,fn2).

14. Nevertheless, "the hours spent preparing a case are not always capable of being categorized according to the theories pursued in developing the case . . . " *Id.* at 467, 364. In the present case, the Court notes that the records reflecting Plaintiffs' counsels' time spent on the case are not capable of being categorized according to the theories pursued in the case. The United States Supreme Court has discussed the inherent difficulty presented by the need to make statutory fee awards based on the degree of the Plaintiff's success. In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the United States Supreme Court stated:

> [T]he plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead, the district court

> should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

Id. at 435 (quoted by *Heldreth*, 219 W. Va. at 468); *see also Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1419 (4th Cir. 1992) (remanding fee award based on district court's reduction of counsel's fee request after recognizing that the plaintiff "received a sizable verdict and that all three counts arose from a 'common core of facts'").

15. In the present case, the Plaintiff asserted claims for age discrimination and disability discrimination. Both of these causes of action are based upon the West Virginia Human Rights Act. Further, both causes of action were based upon a common core of facts. The plaintiff's termination was the adverse action by defendants necessary to the establishment of a prima facie case of both disability and age discrimination. All of the facts surrounding the Plaintiff's work history, his prior job performance, reviews, inadequacies and write-ups were relevant with respect to both claims. Even Plaintiff's physical condition was critical to both claims (not just the disability claim) as Plaintiff had the burden to prove that he was healthy and would be a part of the work force in the future in order to establish his front pay claim. Further, the factual development surrounding the reasons given for Plaintiff's termination was necessary for the establishment of both the age

discrimination claim and the disability discrimination claim as pretext was relevant to both.

16. Additionally, often attorneys in employment cases will advance differing reasons (causes of action) for the same event, such as a termination. Such a tactic does not preclude an award for attorney fees based upon the entirety of plaintiff's counsel's time even where there is no "common core of facts."

> [C]ourts should recognize that reasonable counsel in a civil rights case, as in much litigation, must often advance a number of related legal claims in order to give plaintiffs the best possible chance of obtaining significant relief . . . And even where two claims apparently share no "common core of facts" or related legal concepts, the actual work performed by lawyers to develop the facts of both claims may be closely intertwined. For instance, in taking a deposition of a state official, plaintiffs' counsel may find it necessary to cover a range of territory that includes both the successful and the unsuccessful claims. It is sometimes virtually impossible to determine how much time was devoted to one category or the other, and the incremental time required to pursue both claims rather than just one is likely to be small.

Hensley, 461 U.S. at 448 (Brennan, J., concurring).

17. In *Bishop Coal Company v. Salyers*, 181 W. Va. 71, 380 S.E.2d 238 (1989), the West Virginia Supreme Court held that alternative theories for a

single problem, (i.e., a termination or failure to promote) do not preclude an award of attorneys fees where the factfinder selects only one of those theories.

> As we review the record, we find that the gravamen of Ms. Salyers complaint was that she should have been made a scoop operator and would have been promoted to that position had she not been a woman. On this issue she prevailed entirely and the other allegation of sexual harassment were simply part and parcel of her basic complaint. Often plaintiffs will have one basic problem which, in a complaint, they express in numerous alternative ways, each corresponding to a slightly different legal theory. When this occurs, as it did in the case before us, the fact that the commission or court selects one of the theories upon which to award relief does not necessarily mean that the plaintiff has not substantially prevailed. However, when a complainant sets forth distinct causes of action so that the facts supporting one are entirely different from the facts supporting another, and then fails to prevail on one or more such distinct causes of action, the appellant is correct that attorneys' fees for the unsuccessful causes of action should not be awarded. However, Ms. Salyers' third issue, namely, pattern discrimination, was an extension of her other issues and not a distinct cause of action.

Id. at 83, 250.

18. As discussed above, plaintiff's disability discrimination claim and age discrimination claims involved a "common core of facts." Further, Plaintiff had "one basic problem" as described by *Bishop* in that he was terminated from his position.

19. Given the above, and focusing on "the significance of the overall relief obtained by the plaintiff" as contemplated by *Hensley*, the Court will not reduce the Plaintiff's award of attorney fees due to his failure to prevail on his disability discrimination claim.

20. Defendants further argue that the Plaintiff has submitted insufficient itemized documentation of time spent to determine whether some of the time claimed should be compensated. Essentially, defendants argue generally that Plaintiff's counsel's time sheets do not adequately explain each time entry and thus such time should not be awarded. However, a review of the overall time spent by Plaintiff's counsel in this case, along with the supporting time entries, proves that counsel expended a relatively small amount of time preparing and litigating this matter. Indeed, the Court has reviewed the time records of defendants counsel and it appears as though Mr. Barkus expended approximately 650 hours in defending this case. That figure does not include time from February 2008 to April 1, 2008, as Mr. Barkus was unable to provide records for that time period. The records Mr. Conaway provided to the Court indicate he expended 235.83 hours in defending this case. Accordingly, defendants' counsel recorded roughly 620

more hours than all of Plaintiff's counsel in this litigation. Moreover, there is no indication whatsoever that Plaintiff's counsel attempted to pad their time sheets. The Court finds that Plaintiff's counsel's recordkeeping is sufficient to support an award of attorney fees for all hours claimed.

21. Therefore, the Court specifically finds that all of the hours expended by Plaintiff's counsel were necessary and reasonable in light of the Plaintiff's claims.

22. Turning to the *Pitrolo* factors, the Court will review each one separately to ensure a thorough and complete analysis:

> (a) ***Time and labor expended***: Plaintiff's attorneys and paralegals submitted detailed and contemporaneously maintained time records itemizing each and every task performed on behalf of the Plaintiff in this case. Plaintiff's counsel used a sophisticated case management and billing program to assist them in accurately recording and tracking their time. These time records not only provide ample evidence as to the "time and labor required" to successfully pursue this case, but also comply with the United States Supreme Court's admonition in *Hensley* that "[t]he party seeking an award of fees should submit evidence supporting the hours worked and the rates claimed." 461 U.S. at 433; *see also Brown v. Thompson*, 192 W. Va. 412; 452 S.E.2d 728 (1994) (reducing and disallowing fees based on inadequacy of time records). Based on the foregoing, the Court finds and concludes that the time

expended was reasonable and commensurate with this type of civil litigation.

(b) ***Novelty and difficulty of the questions***: Given the inherent difficulties in proving intent, it is clear that Plaintiff's case presented difficult questions. Moreover, given the Motions for Summary Judgment and numerous Motions in Limine in this case, and the issues contained therein, it is clear that Plaintiff's case presented difficult questions. Additionally, as attested to by the numerous citations to out-of-jurisdiction cases contained within the briefs and the defendant's arguments based upon federal law, the issues in this case also presented a certain degree of novelty for West Virginia Courts. Accordingly, it required more than an average level of skill to perform legal services properly in this matter and to adequately address all of the difficult and novel issues raised.

(c) ***Skills needed to perform the legal services properly***: This case required the performance of virtually every legal skill necessary to successful civil trial litigation. It also required a high degree of specialized skill and knowledge in the filed of civil rights and employment law. The Court finds and concludes that a high degree of skill was necessary to perform the legal services required in this case. In this regard, Plaintiff's counsel are recognized in the legal community as having expertise in these areas.

(d) ***Preclusion of other employment by the attorneys due to the acceptance of the case***: Except for the period directly leading up to, and

including, the trial, the Court concludes that this factor is not particularly relevant to the case. However, the Court recognizes that in small law firms, such as that of Plaintiff's counsel, work performed on one case means loss of gainful employment on another. In this regard, the Court notes that the substantial time spent on this matter as referenced above speaks to the preclusion of other employment due to acceptance of Plaintiff's case.

(e) ***Customary fee***: Plaintiffs submitted affidavits from four prominent West Virginia attorneys concerning the fair market value of legal services in West Virginia. As these affidavits reveal, Plaintiff's initial request for $325.00 per hour for Mr. Atkinson, Mr. Hatfield and Mr. Polak, $225.00 per hour for Mr. Frampton and $110.00 an hour for paralegal time is consistent with the customary hourly fees – i.e., the prevailing market rates – for the legal services rendered. Additionally, the cases cited by the Plaintiff awarding attorney fees in other cases support the same conclusion. Significantly, the Defendant offered no evidence directly addressing the issue of whether the hourly rates sought by Plaintiff were unreasonable. Nevertheless, after Plaintiff's Motion was filed Mr. Barkus submitted records indicating that he was paid $375.00 per hour for his work in this case. Subsequently, Plaintiff indicated that his attorneys should be paid the same amount as Mr. Barkus for their work. The Court finds this argument persuasive. The best way to calculate what the value of the work on this case was worth is to determine what was actually paid to an attorney on an hourly basis

for the work. Based on the foregoing, the Court finds that Plaintiff has met his burden by submitting ample evidence confirming the reasonableness of the proposed hourly rates. The Court therefore concludes that Plaintiff's requested hourly rates of $375.00 per hour for senior attorney time and $225.00 per hour for associate time are reasonable.

(f) ***Whether the fee is fixed or contingent***: The agreement entered into between Plaintiff and his attorneys involved a contingent fee recovery – i.e., if Plaintiff did not prevail, his attorneys would receive no fee for their services. If Plaintiff prevailed, his counsel would receive a percentage of any recovery or settlement awarded or received in connection with the Plaintiff's claims. In addition, Plaintiff's counsel agreed to advance all of the litigation expenses incurred during the course of this proceeding.

(g) ***Time limitations imposed by client or the circumstances***: Except for the time period directly leading up to, and including, trial, the Court concludes that this factor is not relevant to this case.

(h) ***Amount involved and results obtained***: The Court finds and concludes that the results obtained – a recovery of $1,828,280 plus prejudgment interest and post judgment interest – were excellent in this case and support the fee award, particularly given the fact that the Defendant offered the Plaintiff only $10,000 to settle his claims at mediation.

(i) ***Experience, reputation and ability of counsel***: The Court finds and concludes that Plaintiff's counsel is recognized in the legal community as, having expertise in the area of civil rights and employment law. The Court notes Attorney Lonnie Simmons' testimony in his Affidavit:

> I'm also familiar with the quality of work and excellent trial results obtained by Mark Atkinson and Burr Hatfield in a number of employment cases.
>
> Based upon my knowledge of their legal backgrounds and skills as lawyers, in my opinion, and consistent with my experience, the value of their time is worth far more than $325.00 per hour, but I understand that is the hourly rate they have requested.
>
> In employment discrimination cases, Mr. Atkinson and Mr. Hatfield are setting the gold standard for other lawyers to emulate and they are deserving of the highest hourly rate that the Court may consider approving.

(Simmons Affidavit). Further, Mr. Frampton has five years experience as an attorney in Charleston with the vast majority of his experience being in the field of employment law. He has trial experience, has conducted several arbitration hearings, has conducted training in workplaces of compliance with the Human Rights Act, has extensive administrative law experience and has argued before the Supreme Court on several occasions, all on employment-related issues.

(j) ***Undesirability of the case***: The Court finds and concludes that employment cases are typically undesirable to most private practitioners for several reasons – including the need to advance all costs of litigation, the typically long delay in payment for legal services rendered, the specialized area of the law addressed, the necessity and difficulty in proving intent, and the fact that wealthy and powerful individuals and corporations are often the alleged wrongdoers.

(k) ***Nature and length of the professional relationship with client***: The Court is aware only that the law films of Atkinson & Polak, PLLC and Hatfield & Hatfield, PLLC have represented the Plaintiff in this matter since its inception. The relationship continues to the present date. However, the relationship is not likely to continue beyond the instant case. Accordingly, the Court concludes that this factor supports a fully compensatory fee award.

(l) ***Awards in similar cases***: In addition to the previous analysis regarding "customary fees," the hourly rates requested by the Plaintiff are consistent with the reasonable rates awarded to attorneys in similar cases. Walt Auvil, Al Karlin and David Grubb (all well-known employment attorneys) all testify in their Affidavits that $325.00 per hour is an appropriate award for a senior attorney in employment cases. In his Affidavit, Mr. Grubb notes that he was recently awarded an hourly rate of $350.00 by the Roane County Circuit Court. *See* Order, *Carl Milam, et al. v. Fleetwood Homes of N.C., Inc.*, Civil Action No. 02-C-11 (January 2, 2008) (J. Nibert). In

granting the fee motion in that case, the Roane County Circuit Court specifically ruled as follows:

> In terms of hourly rates, Plaintiffs requested $350.00 per hour for lead attorney David Grubb, $250.00 per hour for attorney Cameron McKinney, $200.00 per hour for attorney Kristina Whiteaker, $110.00 per hour for paralegals Tina Totten King and April Romaca White, and $80.00 per hour for legal assistant Amanda McMillen Cain.
>
> * * *
>
> The Court also FINDS that Plaintiffs' proposed hourly rates are consistent with prior awards of attorney's fees by other federal and state courts in West Virginia.

(*Milam* Order at 5-6).

Mr. Grubb was also awarded an effective hourly rate of $357.50 per hour in a fee-shifting case in June of 2006 by the Jackson County Circuit Court. *See* Order, *Stanley Belcher, et al. v. White Chrysler-Plymouth-Dodge of Ripley, Inc., et al.*, Civil Action No. 00-C-10 (June 26, 2006) (J. Evans). Mr. Auvil received an attorney fee award of $300.00 per hour in *Cynthia K. Coleman and Linda C. Wilsman v. Camden-Clark Memorial Hospital*, a case he litigated in the Circuit Court of Wood County, Case No.: 02-C-4. Mr. Karlin received an attorney fee award of $300.00 per hour in *Kenneth McKenzie v. Carroll International Corp.*, a case he litigated in the Circuit Court of Mineral County, Case No.: 98-C-16. Previously, Mr. Grubb received an attorney fee

award of $300.00 per hour by the Kanawha County Circuit Court. (*See* Order, *Larry and Carolyn George v. Nitro Dodge, Inc. and Daimler-Chrysler Corporation*, Civil Action No. 03-C-254 (J. Stucky)). Additionally, Mr. Atkinson and Mr. Polak were previously awarded $300.00 per hour in two separate cases before the Circuit Court of Kanawha County. (Order, *Wolfe v. West Virginia Steel, et al.*, Civil Action No. 03-C-2508 (J. Zakaib); Order, *Thompson v. United Bank, Inc.*, Civil Action No. 05-C-2088 (J. King)).

The Ohio County Circuit Court awarded Wheeling attorney Thomas Schultz $400.00 per hour in an insurance bad faith case in 2004. (Order, *Nationwide Mutual Insurance Company v. Robinson*, Civil Action No. 03-C-442 (May 7, 2004) (J. Gaughan).

Finally, it is significant to note that Mr. Barkus expended roughly 650 hours defending this case and charged his client $375.00 an hour for this time. From the records that were turned over by Mr. Barkus it appear he charged his client over $260,000.00 in defense of this case. Mr. Conaway charged the same client $41,298.73 for his time (235.83 hours) spent in defense of this case.

23. Therefore, the Court finds, given the consideration of the *Pitrolo* factors, that the $375.00 per hour requested for Mr. Atkinson's, Mr. Polak's and Mr. Hatfield's time in this matter is proper, particularly considering the excellent results obtained and Mr. Barkus' hourly rate. Despite the fact that defendants' counsel argues that Mr. Hatfield, as a Madison, West Virginia attorney, should be compensated at a

lesser rate than the attorneys from Charleston involved in this matter, the Court recognizes the excellent advocacy provided by Mr. Hatfield in this matter and other matters the Court is familiar with and declines to award a lesser rate for Mr. Hatfield's time.

24. Regarding associate time, David Grubb testified in his Affidavit that "I also believe that the value of an associate's services is $175.00 to $275.00 per hour, depending on experience." Considering Mr. Frampton's experience, as well as the awards received for associate time in the *Marlin* ($200 to $250 an hour), *Belcher* ($185 to $240 an hour) and *George* cases ($175 to $225 an hour), the Court finds that the Plaintiff should be awarded $225.00 an hour for Mr. Frampton's time in this matter. The Court further finds that the Plaintiff should be awarded $110 an hour for paralegal time spent on this matter, consistent with *Marlin*.

25. The Plaintiff's Motion seeks an award for witness fees and costs as well. Total costs (including witness fees) expended in Plaintiff's case was $8,125.42. Although defendants' counsel argues that "witness fees" do not include expert witness fees, the language contained within the relevant portion of the West Virginia Human Rights Act is very broad. It states:

> In actions brought under this section, the court in its discretion may award all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, to the complainant.

W. Va. Code § 5-11-13(c). As the defendants do not present a compelling reason why expert witness fees should not be included in the broad "witness fees" permitted by the statute, the Court finds that the costs and witness fees expended by Plaintiff's counsel in this case in the amount of $8,125.42 were reasonable and necessary and are properly awardable to a successful Plaintiff pursuant to the West Virginia Human Rights Act. This is especially true in light of the fact that defendants' expenses on the case appear to be between $35,000 to $40,000.

26. According to the lodestar calculation, and given the above analysis, the Court finds and concludes that the Plaintiff's award for senior attorney time on this case is $85,350.00 (227.60 hours times $375 per hour). Plaintiff's award for associate time on this case is $8,032.50 (35.70 hours times $225 per hour). Plaintiff's award for paralegal time on this case is $2,464.00 (22.40 hours times $110 per hour). Further, Plaintiff is awarded $8,125.42 for his costs and witness fees expended, as contemplated by W. Va. Code § 5-11-13(c).

WHEREFORE, for the above-stated reasons, the Court hereby **GRANTS** Plaintiff's Motion For Award of Attorney Fees and Costs. It is therefore **ORDERED** that the Plaintiff be awarded at total of $95,846.50 in attorney fees and $8,125.42 in litigation costs. This award shall accrue interest at the legally prescribed rate from the date of entry of the Order until payment is made in full.

The Court notes the objections of counsel as to those matters adverse to their respective interests.

The Clerk is directed to send certified copies of this Order to all parties or counsel of record.

Entered this 9th day of March, 2009.

/s/ William S. Thompson
THE HONORABLE
WILLIAM S. THOMPSON
Judge of the Circuit Court of
Boone County, West Virginia

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STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 13th of January, 2010, the following order was made and entered:

Danny L. Frye, Plaintiff Below, Respondent

vs.) No. 091157

Superior Highwall Miners, Inc.,
a Delaware corporation;
Terex Corporation, a Delaware corporation,
Defendants Below

Superior Highwall Miners, Inc., Petitioner

On a former day, to-wit, July 28, 2009, came the petitioner, Superior Highwall Miners, Inc., by Ancil G. Ramey, Steptoe & Johnson PLLC; and A. Neal Barkus, A. Neal Barkus PLLC, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Boone County, rendered on March 9, 2009, with the record accompanying the petition. Thereafter, on August 6, 2009, came the respondent, Danny L. Frye, by Mark A. Atkinson and Paul L. Frampton, Jr., Atkinson & Polak, PLLC; and Harry M. Hatfield, Hatfield & Hatfield, his attorneys, and presented to the Court his written response thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal. Justice Benjamin would grant.

A True Copy

Attest: Rory J. Perry, II
Clerk, Supreme
Court of Appeals

IN THE CIRCUIT COURT OF
BOONE COUNTY, WEST VIRGINIA

DANNY L. FRYE,

Plaintiff,

v.

SUPERIOR HIGHWALL MINERS, INC., a Delaware corporation; TEREX CORPORATION, a Delaware Corporation,

Defendants.

CIVIL ACTION NO.: 08-C-16

VERDICT FORM

After you have retired to the jury room to consider your verdict in this case, and after you have elected a foreperson, you are requested to answer certain questions. Please read and answer the following questions:

1. Do you find that the defendants committed an unlawful discriminatory practice against Danny Frye on the basis of a disability?

_____ Yes ✓ No

2. Do you find that the defendants committed an unlawful discriminatory practice against Danny Frye on the basis of his age?

✓ Yes _____ No

If you answered "No" to both of the above questions, your work is complete. If you answered "Yes" to either, or both, of the above questions, please proceed to Question No. 3.

3. Please state the damages, if any, that plaintiff has proven by a preponderance of the evidence to be proximately caused by defendants' unlawful acts.

Back Pay	$ 59,420
Front Pay	$ 243,860
Aggravation, inconvenience humiliation, embarrassment and loss of dignity	$ 25,000
TOTAL	$ 328,280

4. Do you find that defendants' actions in this matter warrant an assessment of punitive damages against them?

✓ Yes _____ No

If you answered "No" to this question, your work is complete. If you answered "Yes" to this question, please proceed to Question No. 5.

5. Please assess the amount of punitive damages.

$ 1,500,000

Date: 11-19-08

/s/ Danny Crum
FOREPERSON

IN THE CIRCUIT COURT OF
BOONE COUNTY, WEST VIRGINIA

Danny L. Frye,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No. 08-C-16
Superior Highwall Miners, Inc., *et al.*,	)	
	)	
Defendants.	)	

Defendants' Motion For Review And Reduction Of Jury Award Of Punitive Damages

Pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure and the common law jurisprudence concerning punitive damages in West Virginia, the Defendants hereby move for the elimination or substantial reduction of the punitive damages awarded by the jury to the Plaintiff in its verdict rendered November 19, 2008. That verdict, which has subsequently been entered as the judgment of this Court, awarded a total of $328,280 in back pay, front pay and non-economic damages, and $1,500,000 in punitive damages.

The Defendants have filed a companion Motion For Judgment As A Matter of Law notwithstanding the verdict, and a Motion For A New Trial. If the Defendants' Motion For Judgment As A Matter Of Law is granted, it will not be necessary for the Court to address this present motion or the Motion For A

New Trial. In the event, however, that the Motion For Judgment as A Matter Of Law is denied, the Defendants ask the Court to grant this Motion and order a new trial on the age discrimination issue, but to permit the jury to consider only compensatory and non-economic damages.

West Virginia's jurisprudence concerning punitive damages requires a two-step analysis. First, there must be a determination of whether the conduct of an actor toward another person entitles that person to an award of punitive damages under the test announced in *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895). If some award of punitive damages is appropriate, the Court must then review the amount of the award under the factors announced in *Garnes v. Fleming Landfill Inc.*, 186 W.Va. 656., 413 S.E.2d 897 (1991). *Alkire v. First National Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122 (1996) (Syllabus Point 7).

A. The Award Of Punitive Damages Should Be Entirely Stricken Because The Defendants Did Not Engage in The Type Of Conduct Justifying An Award Of Punitive Damages.

The ruling by the Court to permit punitive damages testimony came at a point in the trial when both the age discrimination and disability discrimination claims were in the case. In connection with the disability discrimination claim, there were factors surrounding the timeline for surgery and Frye's last day of work that, although contested as a factual

matter, were argued by the Plaintiff as evidence of egregious conduct. The case in its present posture presents a completely different situation. None of the evidence concerning the disability discrimination claim can be used to justify the punitive damages award because the jury found that there was no disability discrimination. This, we believe, requires the Court to take a step back and analyze just what evidence actually introduced at trial could possibly support *any* award of punitive damages.

The type of evidence required is evidence of "gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others." *Mayer v. Frobe*, 40 W.Va 246, 22 S.E.2d 58 (1895) (Syllabus Point 4). The evidence presented at the trial concerning the conduct of the Defendants was not even remotely close to the type of conduct required to support an award of punitive damages, as described in *Mayer*. The only reasonable argument for allowing punitive damages to go to the jury on the age discrimination claim is to paint Defendants' conduct as "willful." But as the West Virginia Supreme Court of Appeals has made perfectly clear, the willfulness required to prove intentional discrimination is not the same willfulness required to support an award of punitive damages. A simple decision to terminate the Plaintiff, even if motivated by some age bias, is not the equivalent of the required malice or ill-will. *See Vandavender v. Sheetz, Inc.*, 200 W.Va. 591, 604, 490 S.E.2d 678, (1997) (bad or legally incorrect corporate

policy is not the equivalent of a mean-spirited, evil intent to cause harm).

In *Harless v. First Nat. Bank in Fairmont*, 169 W.Va. 673, 289 S. E. 2d at 692, (commonly referred to in cases as "*Harless II*") the Supreme Court first discussed the availability of punitive damages in intentional discharge cases based on reasons contrary to public policy.[1] The Plaintiff in *Harless* was an at-will employee who claimed to have apprised his employer that it was not in compliance with federal banking regulations. When he was discharged, he brought an action alleging (1) the action of retaliatory discharge; (2) the tort of outrageous conduct; and (3) the claim of blackballing and blacklisting. The jury returned a verdict in the Plaintiff's favor for $62,500 in compensatory damages and $62,500 in punitive damages.

The Court first noted that it declined "to automatically allow a claim for punitive damages to be added to the damages pictured." The Court observed that there is a "certain open-endedness in the limits of recovery for emotional damages in a retaliatory discharge claim." Instead, the Court started with the assumption that compensatory damages are enough: "(T)he recovery for emotional distress as well as other compensatory damages such as lost wages should

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[1] For analytical purposes, it makes no difference whether a discharge is motivated by a reason made illegal by public policy or statute. Both types of discharge are intentional in the sense that the employer is aware of and responds to the illegal factor.

adequately compensate the plaintiff." 169 W.Va. 692. The Court recognized that there would be the exceptional case where the employer's conduct is "wanton, willful or malicious." *Id.* In such a case, punitive damages *may* be appropriate. The important lesson from *Harless II* is that whatever "willful" means, it takes more than just evidence of intentional discrimination to give rise to a punitive damages award in an employment discrimination case. This is because in *Harless II*, the Supreme Court *set aside* punitive damages that had been awarded by the jury and approved by the Trial Court where there had been a jury finding of intentional discrimination.

As the Court well knows, the facts in this case involved the decision by a business to eliminate the job held by the Plaintiff and an assessment that the Plaintiff was not qualified to perform the duties of the upgraded job. This is the kind of decision that is made every day in the business world. Although the Defendants disagree that there was sufficient evidence upon which the jury could find that the Plaintiff's age motivated the decision, even in part,[2] for purposes of this Motion it must be assumed that Frye's age motivated the decision at least to some degree. However, on the strength of *Harless II*, the Court instructed the jury that "the mere existence of a discriminatory discharge will not automatically give

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[2] This issue is raised in the Defendants' Motion For Judgment as A Matter of Law.

rise to the right to punitive damages. The plaintiff must prove further egregious conduct on the part of the employer." Defendants' Instruction No. 29. Accordingly, the evidence that was used to justify the underlying age discrimination cannot be relied upon solely to support the award of punitive damages.

The evidence concerning the decision to terminate the Plaintiff reveals a thoughtful process that considered the Plaintiff's background and experience. It was not a precipitous decision. When John Olsen advised Gary Clarke of the decision on November 15, 2007, Clarke proceeded to perform a review of the Plaintiff's personnel file and to interview the Plaintiff about his background and skills for over an hour. This is exactly the inquiry into the *bona fides* of the decision that was recommended by the Defendants' consultant, Greg Cochran, when he was asked whether he would have any concerns about a situation in which a 62-year old employee is replaced by a 34-year old. Except Clarke's careful review was conducted *before the age of Frye's "replacement" was known*.[3] Wendy Elliott was not identified as a candidate for the Interim Human Resources Manager job until mid-December 2007.

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[3] As we argue in the Defendants' Motion For Judgment As A Matter of Law, Frye was not actually replaced by Elliott. She performed a wholly different job. His primary duty – payroll processing – was not transferred to Elliott and there was no evidence of the age of the Terex employee in Texas who ultimately got these duties.

The meeting to inform Frye of his impending termination was conducted away from the SHM premises out of concern that Frye would feel awkward hearing the news at work. Frye was not told to "pack up his stuff and get out" as he had been when he was fired from Wind River Consulting. Instead, Frye was told he could have a substantial period of time – as it turned out, over six weeks – before his final day. During that six-week period he was offered the use of an outplacement counselor without the need to sign any Severance Agreement. (Defendants' Exhibit 9, page 1 ¶ 3). Frye testified that during this six-week period, nobody said anything disrespectful to him or made his leaving any more difficult than it otherwise would be.

So what kind of additional evidence – beyond that required to prove the underlying intentional discrimination – will justify an award of punitive damages? In *Harless II*, the Supreme Court of Appeals answered this question:

> FN19. Such a situation [justifying punitive damages] may arise where the employer circulates false or malicious rumors about the employee before or after the discharge or engages in a concerted action of harassment to induce the employee to quit or actively interferes with the employee's ability to find other employment. None of these factors exist in the present case.

169 W.Va. at 692 n.19. *Accord*, *Stafford v. Rocky Hollow Coal Co.*, 198 W.Va. 593, 601, 482 S.E.2d 210,

218 (1996) (affirming trial court's refusal to submit punitive damages to jury). In this case there is none of that evidence. Frye was advised to keep the decision concerning his termination confidential around the office. There was no evidence that the Defendants disclosed this potentially embarrassing matter to other employees. Indeed, the evidence was the Frye himself did so. Furthermore, Frye testified that he had no evidence that SHM or Terex had said anything negative about him to anyone, most especially to any prospective employer.

One would have to distort the factual record to assert that there was any evidence of malice or ill will against Frye demonstrated in the Defendants' conduct. At trial, the Plaintiff argued two principal points to convince the jury it should award the Plaintiff punitive damages. First, the Plaintiff argued repeatedly that the Defendants had interviewed an employee named Scott Spears for an accounting position after having told Frye there were no such positions, and while Frye was still employed by the Defendants. In the Defendants' Motion For A New Trial, we demonstrate that this issue should have been disposed of on summary judgment and never reached the jury. If the Court agrees that the "other jobs" claim should not have gone to the jury, there is even more reason to eliminate the punitive damages award in its entirety. But because of the presence at trial of the issue that the Defendants discriminatorily failed to transfer or hire the Plaintiff into another position, the Scott Spears evidence was necessary to

prove an underlying intentional discrimination.[4] *Shepherdstown Volunteer Fire Dept. v. Human Rights Comm'n*, 172 W.Va. 627, 309 S.E.2d 342 (1983) (part of *prima facie* case to prove that after plaintiff's rejection defendant continued to accept applications of similarly qualified individuals). Accordingly, the Scott Spears evidence is not evidence of additional egregious conduct – there wasn't even evidence of what position Spears was interviewed for. In any event, there had been no open accounting position in November 2007 when Frye was told there was none, so there was no deceit or fraud on the part of the Defendants. The trial evidence was that Dave Hoffman, the interim CFO, did not relinquish the position until March 2008 and the position was not posted until May 2008.

The second argument made by the Plaintiff to the jury was that the Defendants had admitted their own misconduct when they offered a Severance Agreement that included a waiver and release of the right to sue for age discrimination. The Court knows how absurd this argument is. Perhaps an unschooled jury might accept this argument, but it bears no connection to reality and there was no evidence whatever that the Severance Agreement was offered by the Defendants

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[4] The Scott Spears evidence was necessary, but inadequate, proof of intentional age discrimination. As we argue elsewhere, the Plaintiff could not rely entirely on the fact that Spears was interviewed to satisfy his *prima facie* case because he produced no evidence of Spears' qualifications or even his age.

understanding that there was misconduct or discrimination underneath the proposed transaction. To the contrary, the trial evidence from John Olsen, Gary Clarke and Jill Szakacs was that waiver provisions were standard not only at Terex but in industry in general when severance pay is offered.

For all of the foregoing reasons, the Defendants urge the Court to rule that the evidence at trial was insufficient to demonstrate the malice, oppression, etc., required by *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895) and its progeny, and further to rule that the award of punitive damages be completely stricken.

B. The Award Of Punitive Damages Should Be Reduced Nearly To Zero.

If the Court determines that some award of punitive damages must be sustained, then performing the analysis called for in *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, a413 S.E.2d 897 (1991) and *XTO Production Co. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992) leads directly to the conclusion that the award of $1,500,000 in punitive damages should be substantially reduced – nearly to zero.

1. The Award Of Punitive Damages Is Clearly Excessive. In *XTO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992), the Supreme Court of Appeals sought to define the upper boundary for the ratio between punitive damages and compensatory damages. The Court

held that in cases where a defendant acted with "extreme negligence or wanton disregard," but with no actual intent to cause harm, and where the compensatory damages are neither negligible nor very large, the outer limit for the ratio is 5 to 1. In other cases, the Defendant is mean-spirited and intentionally commits acts known to be harmful. One example of this conduct the Court gave is an insurance company that fails to pay a claim it knows is legitimate. 187 W.Va. at 476. In these cases, the punitive damages must be greater to deter further "evil acts." The difference between these categories is the degree to which ill will motivates the defendant to cause harm.

In this case the compensatory damage award of $328,280 is clearly not negligible. Whether the compensatory damage award is very large depends upon one's perspective, but for purposes of this argument we will assume it is not. The ratio of punitive damages to compensatory damages in this case is 4.6 to 1, near the outer boundary despite nothing extreme or wanton in the Defendants' conduct and no proof whatever the Defendants intended to harm the Plaintiff for the sake of harm. In fact, every bit of proof concerning the Defendants' behavior is that they proceeded carefully to avoid unnecessary harm to the Plaintiff and treated him with the utmost respect at all times. Accordingly, even before consideration of the *Garnes* factors, there is a strong case for substantially reducing the amount of punitive damages.

2. **The Likely Harm From Defendants' Conduct Is Relatively Small.** The first *Garnes* factor is the likelihood of harm from the Defendants' conduct. Here, the potential harm from the Defendants' actions was limited to the Plaintiff himself. The Defendants' decision to terminate Danny Frye was not made in the context of a class-wide reduction in force. Instead, it was a decision based upon the facts of one individual's qualifications and work record. In other words, whatever improper considerations entered into this decision would be unlikely to recur simply because the facts relating to other employees would be different. And, in fact, nothing like this has occurred. The Plaintiff brought no other employees to the stand to complain that they, too, were the victims of age discrimination. John Olsen has supervised or been responsible for many thousands of employees over the years and not one of them except Frye has over complained that Olsen discriminated against them. Moreover, there was a complete absence of evidence that Olsen had a bias against older workers. Also of importance on this first *Garnes* factor is the undisputed evidence that SHM employed many older workers before the Terex acquisition and has continued to employ many older workers after the acquisition.

The actual harm was confined to the loss by the Plaintiff of a job paying roughly $50,000 per year plus benefits. The jury awarded Frye the amount that would compensate him through the end of 2011, the year he turned 66. So the jury concluded that the

actual harm done here was limited to roughly three years of working life. Contrast this to the circumstances wherein a defendant's wanton or reckless conduct causes serious debilitating injury to another person that disables him from working for life. As we argued at trial and Frye admitted, Frye is fully capable of working. The jury has basically paid him for not working for the next three years – but if he chooses to work he gets a windfall measured by his new salary. To add on top of that the $1,500,000 in punitive damages is nearly unthinkable.

Also, the Court should note that the jury awarded Frye a modest $25,000 in non-economic damages despite his overblown testimony about how distraught he was over his termination. These non-economic damages were to compensate Frye for "humiliation, embarrassment and loss of dignity." *See* Plaintiff's Instruction No. 3. *Akers v. Cabell Huntington Hospital, Inc.*, 215 W.Va. 346, 599 S.E. 2d 769 (2004). Obviously, the jury did not think the harm done to Frye's dignity amounted to much. This speaks volumes about how serious and harmful overall the actions of the Defendants actually were and further points out how extreme the award of punitive damages is.

3. The Defendants' Conduct Was Not "Reprehensible." *Garnes* directs the Court to consider the "reprehensibility" of the Defendants' conduct. Yet reprehensible is simply not a word that can be used to describe the conduct of the Defendants.

The actions that caused harm to the Plaintiff were confined to a short period of time in November and December 2007. The allegations here are not similar to a polluter who ruins ground water year after year or a manufacturer who turns out dangerous and defective products over a long period.

When an employee is terminated, it is predictable that the termination might cause economic loss. But the Court instructed the jury that Frye was an "employee at will" whose employment could be terminated at any time for any reason or for no reason. *See* Defendants' Instruction No. 3; *Barlow v. Hester Industries*, 198 W.Va. 118, 134, 479 S.E.2d 628, 644 (1996). The termination here was no more likely to cause harm than the non-discriminatory termination of any other employee at will – and such a termination is entirely within the right of an employer. In other words, the predictable harm from a termination is the same regardless of the motivation behind it. But here the Defendants allowed the Plaintiff to work six weeks before his final day of work. Working into 2008 allowed him to get a new allotment of 80 vacation hours for which he was paid in his final paycheck, so the Defendants, in effect, allowed the Plaintiff to work the equivalent of eight weeks with full pay before his final day. In addition, the Defendants went beyond their own severance policy to create a safety net so that the Plaintiff would not suffer harm. They offered outplacement counseling that did not require a waiver of rights and 13 weeks

of severance pay when the policy called for only one week.

The Defendants did not attempt to conceal or cover up their actions or the harm caused. To the contrary, the Defendants told Frye that they wanted to inform him about his job loss as early as possible. This obviously would allow more time for the Plaintiff to plan for what came next in his life and to lessen the shock and disruption of a last minute termination. The Defendants asked Frye to keep his termination confidential in order to lessen the impact on him and others, but he ignored this request. This request was obviously not a mandatory instruction because Frye was not disciplined for discussing the fact that he had been terminated with other employees.

The second factor *Garnes* requires the Court to assess "whether and how often the Defendant engaged in similar conduct in the past." Attached to this Motion are the Affidavits of Steven A. Antoline, Stacey B. Babson-Smith and Paul E. Smith. Mr. Antoline was a founder of SHM. His Affidavit states that from the founding of SHM in 1994 until his departure from SHM after the Terex acquisition in mid-November 2007, no administrative agency, judge or jury made a finding of age discrimination against SHM.

From October 14, 2002 until February 29, 2008, Ms. Babson-Smith served in the positions of Corporate Counsel, HR Compliance and Vice President Deputy General Counsel, Employment for Terex Corporation.

In these positions she was responsible for management or oversight of all employment discrimination litigation brought by an employee of Terex Corporation. Although her position changed as of March 1, 2008, her responsibilities in this area continued until September 22, 2008. (Babson-Smith Affidavit, ¶ 2). During this period, there was no finding by an administrative agency, judge or jury that Terex Corporation had committed age discrimination. (Babson-Smith Aff., ¶ 3). Mr. Paul Smith replaced Ms. Babson-Smith in the role of Vice President Deputy General Counsel – Employment on September 22, 2008. (Smith Affidavit, ¶ 2). His Affidavit makes clear that there was no finding of age discrimination between the date he assumed his new job and the one made by the jury in this case. (Smith Aff., ¶ 3).

The second *Garnes* factor also requires the Court to assess "whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him." Throughout this litigation, the Defendants have been willing to resolve it for a reasonable amount. The Defendants' settlement offers went from $10,000 to $110,000. In the mandatory mediation before Mediator Robert Allen, the Plaintiff's demand was $1.1 million. (Babson-Smith Aff., ¶ 5). The Defendants believed this to be an absurd figure in view of their defense of "after-acquired evidence of misconduct," which would have limited the Plaintiff's compensatory damages to roughly

$20,000. So the Defendants offered $10,000. (Babson-Smith Aff., ¶¶ 4, 5). It was the Plaintiff and his counsel who walked out of mediation without responding to this offer. When that occurred, the Defendants asked the Mediator to inform the Court that a ruling on pre-trial motions either way would facilitate settlement. (Babson-Smith Aff., ¶¶ 5, 6).

When the Court denied the Defendants' Motion For Summary Judgment, Mr. Smith engaged in further settlement discussions through the Mediator and expressed the willingness to raise the Defendants' offer to the high five figures. (Smith Aff., ¶ 4). Mr. Smith was then advised by the Mediator that the Plaintiff categorically rejected a settlement in the five figure range. (Smith Aff., ¶ 4). Then on the morning of trial, the Court conducted a mediation at which the Defendants raised their offer to $110,000. This offer too was rejected. (Smith Aff., ¶ 5).

4. The Defendants Did Not Profit From Frye's Termination. Neither profit nor cost savings had anything to do with the Defendants' actions. According to his own economist, Frye's total, annualized compensation at SHM was $67,986. This included a grossly excessive overtime figure of roughly $20,000 that would not be sustainable year over year. The evidence at trial was that Wendy Elliott followed Frye in the Human Resources role at SHM. She received a salary of $51,500 from early February 2008 until early October 2008. Elliott never went on the SHM payroll because she preferred to remain on the Terex benefit plan. The Terex benefits were more complete,

and presumably more costly to the company. The permanent HR Manager, Jill Szakacs, was hired in early October 2008. Her salary was $80,000 with the eligibility for a 15% bonus. Clearly, the Defendants did not profit from terminating Frye and replacing him with either Elliott or Szakacs.

The Plaintiff made a feeble attempt at trial to suggest that terminating Frye saved health care costs because he was an older worker. Their claim was that older workers "cost more." But there was no connection between this principle, assuming it is true, and the decision to terminate Frye. Frye's surgery was covered by Terex health insurance even after his termination. He has completely recovered and his health care costs are approaching normal, and there was no evidence that avoidance of his future costs was a motivator. In fact, the suggestion that SHM or Terex gets rid of older workers because of health care costs disintegrated in the face of the Defendants' trial evidence. Bobby Johnson alone had $500,000 in family medical costs in 2007-08 and he is older than Frye, but is still employed by Terex. In addition, SHM and Terex returned to work numerous older workers after lengthy absences related to health problems, including Clint Clevenger, Eldon Garten, Bruce Massey, and others.

5. Punitive Damages Of $1,500,000 Bears No Reasonable Relationship To Compensatory Damages Of $324,280. As we argued in subpart 1 above, the amount of punitive damages in this case pushes the envelope of constitutionality even had the

Defendants acted with "extreme negligence or wanton disregard." But there was simply nothing extreme or wanton about the Defendants' conduct. And the award of punitive damages bears no relationship to the compensatory damages except an extreme mathematical one. It is more likely that the jury responded the appeal of Plaintiff's counsel to award a large punitive damages figure "to keep them in Connecticut from laughing at you (the jury)." The Plaintiff's counsel argued that unnamed people at Terex headquarters would marvel and laugh that the company was caught "red handed committing age discrimination" but got away "scot free." Obviously, this was an appeal to xenophobia and emotion, not to reason. This is the only way to explain the punitive damages in this case. The jury's award of punitive damages was not related to, and certainly was not constrained by, their award of compensatory damages.

5. The Financial Position Of The Defendants Should Not Be Used As A Multiplier Of Damages. The Court permitted evidence of the gross sales and net worth of Terex Corporation to be presented to the jury over the Defendants' objection. The Plaintiff's counsel even asked his expert economist to testify what Terex would "have left" if the jury awarded $1 million or $2 million in punitive damages. Obviously, Terex Corporation can pay the judgment. But it should not be punished for being a successful business that operates on a large scale. That penalizes the wrong thing and equates business success with culpability. If the jurisprudence in this

State permits a large, successful business to be soaked simply because it is large and successful, that type of business will choose not to locate here. The business may be "punished" in the short run, but the Court must ask itself who will suffer in the long run?

6. The Cost Of Litigation Has Not Been Borne By The Plaintiff Thus Far And Will Ultimately Be Paid By The Defendants. This case was tried within *ten months* of being filed. That is a speed worthy of the "Rocket Docket" in the U.S. District Court for the Eastern District of Virginia. Furthermore, there was not one motion for continuance filed or other delaying maneuver conducted by the Defendants. Accordingly, this was not a costly piece of litigation as litigation goes and its cost was not multiplied by anything done by the Defendants. In addition, we believe that the Plaintiff and his counsel had an arrangement whereby expenses were advanced by counsel, and attorneys fees were to be paid either on a contingency fee basis or by the Defendants if the litigation was successful. If we are incorrect, let the Plaintiff show otherwise. Finally, the costs of litigation are borne by the losing party according to law after a judgment is entered. For that reason, the Plaintiff will have had litigation success unfettered by any costs.

7. There Have Been No Criminal Sanctions Levied Upon The Defendants For Any Conduct Related To This Case. *Garnes* requires the Court to assess whether there have been criminal as well

as civil sanctions. There have not been criminal sanctions.

8. There Have Been No Other Civil Actions Filed Against The Defendants For The Same Conduct Alleged In This Case. *Games* also requires the Court to assess whether there have been other civil actions for the same conduct, such as other civil actions in a mass tort. In this cases there have been no other civil actions.

9. Punitive Damages Would Be Inappropriate To Encourage A Settlement Where No Clear Wrong Has Been Committed And The Defendant's Litigation Position Is Reasonable. It is hard to argue in the abstract with the proposition that parties who have committed a clear wrong – clear to themselves and others – will be encouraged to settle by the prospect of punitive damages. But the problem is applying that abstract principle to the real world.

Prospectively, the threat of punitive damages deters all defendants from litigation. But actually imposing punitive damages, as opposed to creating the threat of them, is a wholly different matter. Imposing punitive damages in all cases where the plaintiff is successful simply to deter those defendants who have committed a clear wrong would have the effect of discouraging the use by citizens of this State of the processes of law to defend themselves in cases where they have a legitimate defense. There is a huge difference between a defendant who has

committed a clear wrong and should settle and a defendant who has a legitimate defense. Punitive damages should not be used to deter the presentation of that defense. For example, in this case the jury found in the Defendants' favor on half of the issues alleged by the Plaintiff. It is ludicrous to say that the threat of an award of punitive damages would have appropriately induced these Defendants to settle the case before trial when the reasonableness of their position was later confirmed by the jury itself. Under these circumstances, the actual imposition of punitive damages makes even less sense.

C. Conclusion

For all of the foregoing reasons, the Court should strike the award of punitive damages from the judgment in its entirety because there was insufficient evidence of any conduct justifying these damages or, alternatively, after evaluating the case under the *Garnes* factors, reduce them to near zero.

Respectfully submitted,

SUPERIOR HIGHWALL
MINERS, INC AND
TEREX CORPORATION

/s/ A. Neal Barkus
Their Counsel

A. Neal Barkus, Esq.
A. Neal Barkus PLLC
224 West King Street
Martinsburg, WV 25401

Timothy R. Conaway
Conaway & Conaway
63 Avenue B
Madison, WV 25130

Certificate Of Service

I hereby certify that on this 12th day of December, 2008, I served the foregoing Defendants' Motion For Review And Reduction Of Jury Award Of Punitive Damages by first-class mail, postage pre-paid, to counsel for the plaintiff as follows:

Mark A. Atkinson, Esq.
Atkinson & Polak PLLC
Post Office Box 549
Charleston, West Virginia 25322-0549

Harry M. Hatfield
Matthew M. Hatfield
Hatfield & Hatfield
PO Box 598
Madison, WV 25130

/s/ A. Neal Barkus

IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

Danny L. Frye, Plaintiff,	)	
vs.	)	Civil Action No. 08-C-16
Superior Highwall Miners, Inc., *et al.*, Defendants.	)	

Affidavit Of Stacey B. Babson-Smith

I, Stacey B. Babson-Smith, residing at 49 Old Stage Coach Road, Weston CT 06883, do hereby swear that the following facts are true and correct.

1. I am over the age of 18 years and am fully competent to provide this affidavit. All of the facts contained in this affidavit are presented based upon my personal actions and observations.

2. During the period from October 14, 2002 until February 29, 2008, I was employed in the Legal Department of Terex Corporation in the positions of Corporate Counsel, HR Compliance and Vice President Deputy General Counsel, Employment. In these positions, I was responsible for, among other things, management and/or oversight of any employment litigation brought by an employee of Terex Corporation, its subsidiaries or affiliates in the United States. Although my position changed effective March 1, 2008, my responsibilities in this area continued until September 22, 2008, when Paul E. Smith joined Terex

Corporation as Vice President, Deputy General Counsel, Employment. Terex Corporation, together with its subsidiaries and affiliates employed approximately 8500 employees in the United States between the payroll period August 15, 2008 and August 31, 2008.

3. During the period in which I was responsible for management and/or oversight of any employment litigation brought by an employee of Terex Corporation, its subsidiaries and affiliates, no administrative agency, court or jury made a finding that Terex Corporation discriminated against any employee because of age.

4. I attended the mediation in this case conducted by Mediator Robert Allen in Charleston, West Virginia, on September 11, 2008. Before the mediation, the Defendants had filed a Motion For Summary Judgment seeking the dismissal of the whole case. But the Defendants also argued that the Plaintiff's theft of certain confidential documents constituted after-acquired evidence of misconduct that would have resulted in the Plaintiff's immediate termination had it been known. The remedy for this misconduct prescribed by the U.S. and West Virginia Supreme Courts is elimination of all front pay and a truncation of the back pay damages. The truncated back pay damage period in this case would have yielded approximately $20,000 in back pay, even if the Plaintiff survived summary judgment and proved discrimination at trial.

5. At the mediation, the Plaintiff, by counsel, made a demand of $1.1 million. In light of the limitation on damages that the Defendants believed would prevail, the Defendants countered with an offer of $10,000. Without modifying his demand, the Plaintiff and his counsel walked out of the mediation.

5. Following the Plaintiff's departure from the mediation, counsel for the Defendants asked the Mediator to report to the Court that a ruling on the pending Motion For Summary Judgment, one way or the other, would facilitate settlement discussions in the future. The Defendants expressed a willingness to engage in future discussions after such a ruling.

Date 12/4/08 /s/ Stacey B. Babson-Smith
Stacey B. Babson-Smith

State Of Connecticut
County of Fairfield

Subscribed and sworn to before me, a Notary Public for the State of Connecticut this 4th day of December, 2008.

/s/ Joanne Ritchie Jontz

My commission expires: 8-31-2011

JOANNE RITCHIE JONTZ
CONNECTICUT
APPOINTED 8-15-2006
EXPIRATION 8-31-2011

IN THE CIRCUIT COURT OF
BOONE COUNTY, WEST VIRGINIA

Danny L. Frye, Plaintiff,	)	
vs.	)	Civil Action No. 08-C-16
Superior Highwall Miners, Inc., *et al.*, Defendants.	)	

Affidavit Of Steven A. Antoline

I, Steven A. Antoline, residing at 303 Middle Collison Creek Road, Mt. Lookout, West Virginia, do hereby swear that the following facts are true and correct.

1. I am over the age of 18 years and am fully competent to provide this affidavit. All of the facts contained in this affidavit are presented based upon my personal actions and observations.

2. I am a founder of the company that is now Terex SHM. I founded Superior Highwall Miners, Inc. in October 1994 with a co-owner. For the period beginning in October 1994 through mid-November 2007, I served in the position of President of Superior Highwall Miners, Inc.

3. In the position of President I managed the day to day operations of the company, including the supervision and management of all personnel and legal matters.

4. Since the founding of Superior Highwall Miners, Inc. in 1994 through mid-November 2007, no employee alleged that he or she was treated unfairly or discriminated against because of age, and there were no findings by any administrative agency, court or jury to the effect that the company or any of its executives had discriminated against anyone because of age.

Dated: DECEMBER 3RD, 2008 /s/ Steven A. Antoline
Steven A. Antoline

State Of West Virginia
County of Greenbrier

Subscribed to and sworn before me, a Notary Public for the State of West Virginia, this 4th day of December, 2008.

/s/ Jessica Terry

[Seal]

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
JESSICA TERRY
P.O. Box 15-C
LEWISBURG WEST VIRGINIA 24936
MY COMMISSION EXPIRES DECEMBER 13, 2017

My commission expires: December 13, 2017

IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

Danny L. Frye, Plaintiff,	)	
vs.	)	Civil Action No. 08-C-16
Superior Highwall Miners, Inc., *et al.*, Defendants.	)	

Affidavit Of Paul E. Smith

I, Paul E. Smith, residing at 1615 East Beaver Lake Drive S.E., Sammamish, Washington, do hereby swear that the following facts are true and correct.

1. I am over the age of 18 years and am fully competent to provide this affidavit. All of the facts contained in this affidavit are presented based upon my personal actions and observations.

2. From September 22, 2008 to the present, I have been employed in the Legal Department of Terex Corporation in the position of Vice President and Deputy General Counsel – Employment. In this position I am responsible for, among other things, management and/or oversight of any employment litigation brought by an employee of Terex Corporation, its subsidiaries or affiliates, worldwide. During this period, Terex Corporation, together with its subsidiaries and affiliates, employed approximately 8,000 employees in the United States.

3. During the period in which I have held the position of Vice President and Deputy General Counsel – Employment, no administrative agency, court or jury has made a finding that Terex Corporation discriminated against any employee because of age, other than the above-captioned case.

4. After the Court ruled on the Defendants' Motion for Summary Judgment, I engaged in settlement discussions by telephone with Mediator Robert Allen of Charleston, West Virginia. In these discussions, I indicated to Mr. Allen that the Defendants were prepared to substantially increase their prior settlement offer of $10,000. I also explained that based on our assessment of the case, we did not believe that a settlement offer in the six-figure range (i.e., $100,000 or greater) was warranted here. However, the Defendants were prepared to make an offer well into the five-figure range. After Mr. Allen had additional discussions with the Plaintiff's counsel, he told me that the Plaintiff categorically rejected any settlement in the five-figure range. Based on these discussions, neither the Defendants nor, to our understanding, the Plaintiff, made any new specific dollar figure settlement offer.

5. As trial was about to commence on November 5, 2008, the Defendants once again assessed the situation and in the spirit of compromise and in a final last attempt to resolve this matter short of trial, determined to increase their settlement offer beyond the five-figure range that had been previously discussed with Mr. Allen. The Defendants did this with

great reluctance, given that they believed – and still believe – that the record in this case cannot support a conclusion that unlawful discrimination occurred here, and given that Plaintiff had never moved off of his $1.1 million demand. I informed Judge Thompson that the Defendants would pay $110,000 to settle the case. I was later informed by Judge Thompson that the Plaintiff did not accept this offer.

Dated: 12/4/08 /s/ Paul E. Smith
Paul E. Smith

State Of Washington
County of King

Subscribed and sworn to before me, a Notary Public for the State of Washington, this 4th day of December, 2008.

/s/ Sharon R. Tucker

My commission expires: 8-1-2010 [Seal]

IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

Danny L. Frye, Plaintiff,	)	
vs.	)	Civil Action No. 08-C-16
Superior Highwall Miners, Inc., *et al.*, Defendants.	)	

Defendants' Reply In Support Of Their Motion For Review And Reduction Of Jury Award Of Punitive Damages

The parties agree that West Virginia law requires a two-step analysis of any award of punitive damages. First, the Court must determine whether the conduct of an actor toward another person entitles that person to an award of punitive damages under the test announced in *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895). If some award of punitive damages is appropriate, the Court must then review the amount of the award under the factors announced in *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656., 413 S.E.2d 897 (1991). *Alkire v. First National Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122 (1996) (Syllabus Point 7).

A. The Award Of Punitive Damages Should Be Entirely Stricken Because The Defendants Did Not Engage in The Type Of Conduct Justifying An Award Of Punitive Damages.

The Defendants have demonstrated that the evidence necessary to prove intentional discrimination under the Human Rights Act is insufficient on its own to constitute the type of willful or malicious misconduct required for punitive damages. *Harless v. First Nat. Bank in Fairmont*, 169 W.Va. 673, 289 S. E. 2d 692 (1982) (*Harless* II). *See Vandavender v. Sheetz, Inc.*, 200 W.Va. 591, 604, 490 S.E.2d 678 (1997). Indeed, the Court so instructed the jury and the Plaintiff concedes the point: "The Plaintiff agrees that the mere existence of [a] discriminatory discharge does not automatically give rise to a punitive damages claim." (Opposition, p. 7). But having conceded the point, the Plaintiff inexplicably devotes no less than four pages of his Opposition arguing that there was enough evidence for the jury to conclude that the Defendants engaged in intentional discrimination.[1]

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[1] For example, at p. 4, the Plaintiff argues that because Frye "was terminated at age 62 and replaced by a 34 year old," the jury could conclude that the Defendants "intentionally terminated Mr. Frye on the basis of age." Then again at p. 5, the Plaintiff argues that "[t]he jury could have also found that the defendants were guilty of intentional discrimination in disregard of the Plaintiff's rights by finding that the reasons given for the Plaintiff's termination were pretextual." Of course, a finding of pretext is essential for a finding of intentional discrimination where the defendants offered a non-discriminatory reason. Then at page 6, the Plaintiff argues that the jury could

(Continued on following page)

This is a clear signal to the Court that there is no way for the Plaintiff to defend this award of punitive damages. There is simply no evidence of willfulness or malice of the sort required by *Mayer v. Frobe*.

The Court in *Harless II* set out the type of evidence of additional egregious misconduct that would justify an award of punitive damages. This included where the employer circulates false or malicious rumors about the employee before or after the discharge or engages in a concerted action of harassment to induce the employee to quit or actively interferes with the employee's ability to find other employment. 169 W.Va. at 692 n.19. *Accord, Stafford v. Rocky Hollow Coal Co.*, 198 W.Va. 593, 601, 482 S.E.2d 210, 218 (1996) (affirming trial court's refusal to submit punitive damages to jury). As the Court well knows, there was no evidence of any misconduct of this sort.

When the Plaintiff finally gets around to discussing what *additional* evidence there might be of egregious conduct by the Defendants, he comes up with the following. First, he claims "[t]here is evidence to support a conclusion that the defendants misrepresented the reasons for the Plaintiff's termination in order to cover up their illegal motive." (Opposition, p. 8). What is this evidence? If it existed,

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find pretext from "shifting explanations." This lengthy rehash of the arguments in support of the verdict suggest that the Plaintiff doesn't really know what to say in support of the punitive damages award.

the Plaintiff would surely cite it. Since there was no direct evidence of discrimination – no "smoking gun" proving age bias – there could have been no "cover up." The Plaintiff is really arguing that if a defendant asserts a non-discriminatory reason that is not accepted by a jury, automatically it has covered up its discriminatory motive and punitive damages are appropriate. The Court should be very careful not to go down that road to error.

Then the Plaintiff argues "[t]here is evidence to support a conclusion that the defendants kept changing the reasons for the Plaintiff's termination in order to cover up their illegal motive." (Opposition, p. 8). This is the same argument that the Plaintiff made to explain how the jury could have found pretext. But the Plaintiff wisely does not even attempt to explain how this evidence can at once be necessary for a finding of intentional discrimination *and* additional egregious conduct beyond that which is necessary. Putting that logical conundrum aside, *there is no such evidence of shifting explanations*. The Defendants consistently gave the Plaintiff the same explanation and maintained that same explanation throughout the post-termination period and at trial. The cases that allow a finding of pretext based on shifting explanations uniformly do so where the Defendant gives one exclusive explanation then changes the explanation when the first one becomes untenable. *See, e.g., EEOC v. Ethan Allen, Inc.*, 44 F.3d 116 (2d Cir. 1994).

Then the Plaintiff argues that the Defendants' trial evidence proving that the Plaintiff lied on his employment applications and retained a severance payment to which he was not entitled justifies an award of punitive damages. The Plaintiff asserts "[t]o cover up their illegal motive the defendants attacked the Plaintiff's character by questioning his integrity and denigrating his work ethic." (Opposition, pp. 8-9). Can the Plaintiff seriously be arguing that a defendant cannot impeach a plaintiff's honesty and credibility without committing egregious willful or malicious conduct? If the Plaintiff is correct, someone had better alert the Supreme Court of Appeals so that West Virginia Rule of Evidence 607 can be amended. And the evidence in this regard – the Plaintiff's false applications, his breaches of confidentiality, his retention of the severance payment – was true and, for the most part, uncontested.

The Plaintiff saves his best for last. He argues that there was evidence of an open accounting position for which the Defendants interviewed another candidate.[2] He further argues that Frye was qualified to fill multiple accounting positions but was not considered for the open position. (Opposition, p. 9).

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[2] The evidence was not as the Plaintiff asserts. The CFO position was not open either in November 2007 when the Plaintiff inquired or in January 2008 when Scott Spears was interviewed. It was occupied by Interim CFO Dave Hoffman until late spring 2008. When the position did become open in May 2008 it was posted on the internet and the Plaintiff failed to apply.

The Court will recognize this evidence as the very same that the Plaintiff relied upon to prove that he was denied "other jobs" because of his age. But the Plaintiff's argument highlights again the problem created by allowing this claim to go to the jury without a verdict form to distinguish it from the termination claim. For the Plaintiff is assuming that he prevailed on the termination claim, not the "other jobs" claim. If he prevailed on the other jobs claim, then the very evidence he cites above to justify punitive damages is exactly the evidence he needed to prove the claim. *Shepherdstown Volunteer Fire Dept. v. Human Rights Comm'n.*, 172 W.Va. 627, 309 S.E.2d 342 (1983) (*prima facie* case requires proof that the plaintiff applied for an open position). It cannot be the additional evidence of egregious conduct required by *Harless II*.

The record in this case is replete with facts showing that the Defendants went out of their way to soften the blow that a termination would mean for the Plaintiff. The decision was not made precipitously, but rather after careful consideration of the Plaintiff's background. The Plaintiff was told immediately after the decision was made, not strung along until the last minute. He was offered a severance package far more generous than usual. The Defendants kept the decision confidential from other employees. Nobody in management said or did anything to humiliate the Plaintiff or rub salt in his wounds. The fact that the jury awarded only $25,000 in non-economic damages confirms the point.

The bottom line is that there is no evidence of the egregious willful or malicious conduct that can justify *any* award of punitive damages. Accordingly, the Court should strike the award of punitive damages from the judgment order and direct a new trial solely on the termination claim, without allowing the jury to consider punitive damages.[3]

Respectfully submitted,

SUPERIOR HIGHWALL MINERS, INC AND TEREX CORPORATION

/s/ A. Neal Barkus
Their Counsel

A. Neal Barkus, Esq.
A. Neal Barkus PLLC
224 West King Street
Martinsburg, WV 25401

[3] Only one comment is appropriate concerning the Plaintiff's review of the *Garnes* factors. During the pre-trial mediation, the Court urged the Defendants to offer the Plaintiff a figure above $100,000, which the Defendants counsel then did after extensive consultation with their principals. The Court subsequently returned with the news that the Plaintiff had reluctantly dropped his demand to $190,000. At no time were the Defendants told that the Court or anybody else "recommended" a settlement of $190,000. Even if the figure had been "recommended," the Defendants' failure to accept this figure cannot be characterized as recalcitrant. And it would be improper post-hoc logic to argue that the Defendants should be punished for not assessing the risk of loss in complete sync with the figure the jury later awarded.

Timothy R. Conaway
Conaway & Conaway
63 Avenue B
Madison, WV 25130

Certificate Of Service

I hereby certify that on this 6th day of January, 2008, I served the foregoing Defendants' Reply In Support Of Their Motion For Review And Reduction Of Jury Award Of Punitive Damages by first-class mail, postage pre-paid, to counsel for the plaintiff as follows:

Mark A. Atkinson, Esq.
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Post Office Box 549
Charleston, West Virginia 25322-0549

Harry M. Hatfield
Matthew M. Hatfield
Hatfield & Hatfield
PO Box 598
Madison, WV 25130

/s/ A. Neal Barkus

IN THE CIRCUIT COURT OF
BOONE COUNTY, WEST VIRGINIA

DANNY L. FRYE,

Plaintiff,

v.

SUPERIOR HIGHWALL MINERS, INC., a Delaware corporation; TEREX CORPORATION, a Delaware Corporation,

CIVIL ACTION NO.: 08-C-16

Defendants.

PLAINTIFF'S MOTION FOR AWARD OF ADDITIONAL ATTORNEYS' FEES AND COSTS

On March 9, 2009, this Court entered its "Order Granting Plaintiff's Motion For Attorney Fees and Costs." That Order granted the Plaintiff $95,846.50 in attorney fees and $8,125.42 in costs. These fees and expenses represented the time and expenses Plaintiff's counsel spent preparing the case for trial and in trial.

Since the trial, Plaintiff's counsel has expended more time and money in responding to post-trial motions and defendants' Petition For Appeal to the West Virginia Supreme Court of Appeals.[1] Mr.

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[1] On January 13, 2010, the Supreme Court refused the defendants' Petition Per Appeal.

Atkinson has spent 29.80 additional hours on Plaintiff's case. Mr. Polak has spent 18.10 additional hours on Plaintiff's case. Mr. Hatfield has spent 32.60 additional hours on Plaintiff's case. Mr. Frampton has spent an additional 109.20 hours on Plaintiff's case. The paralegals at Atkinson & Polak, PLLC have spent an additional 7.00 hours on Plaintiff's case. Further, Plaintiff's counsel has incurred $2,496.00 in additional expenses on Plaintiff's case.

In its prior Order Granting Plaintiff's Motion for Attorney Fees and Costs, the Court found $375.00 per hour an appropriate rate for senior attorney time and $225.00 per hour an appropriate rate for associate attorney time. Additionally, the Court previously found that $110.00 per hour was an appropriate rate for paralegal time. Applying those same rates to the additional time expended post-trial on Plaintiff's case by his attorneys and their staff, Plaintiff should be awarded: (1) $30,187.50 for senior attorney time (80.5 hours x $375.00); (2) $24,570.00 for associate attorney time (109.20 hours x $225.00); and (3) $770.00 for paralegal time (7.00 hours x $110.00). Additionally, Plaintiff should be awarded $2,496.00 for his additional expenses. Taken together, Plaintiff seeks an additional $58,023.50 for attorney time, paralegal time and expenses in this matter.[2]

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[2] Plaintiff anticipates additional time spent in pursuing this Motion, including replying to defendants' response and attending a hearing on the issue.

WHEREFORE, for the above stated reasons, the Court should GRANT Plaintiffs' Motion for Award of Additional Attorney Fees and Costs in the amounts requested in the Motion.

DANNY L. FRYE
By Counsel

/s/ Mark A. Atkinson

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CERTIFICATE OF SERVICE

I, Mark A. Atkinson, counsel for Plaintiff, do hereby certify that service of the "NOTICE OF MOTION" and "PLAINTIFF'S MOTION FOR AWARD OF ADDITIONAL ATTORNEYS' FEES AND COSTS" was made upon the parties listed below ***via facsimile*** and by mailing a true and exact copy thereof to:

A. Neal Barkus, Esquire
A. Neal Barkus PLLC
224 West King Street, Suite 200
Martinsburg, WV 25401
Fax No.: (888) 231-2495
Counsel for Defendants

Ancil G. Ramey, Esquire
STEPTOE & JOHNSON
P.O. Box 1588
Charleston, WV 25326-1588
Fax No.: (304) 353-8180
Counsel for Defendants

in a properly stamped and addressed envelope, postage prepaid, and deposited in the United States mail this 20th day of January, 2010.

/s/ Mark A. Atkinson
Mark A. Atkinson